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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,

Petitioners,

v.

JOHN C. COOK, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the mere continued use of a newly created seniority list, which is challenged by plaintiffs as age-discriminatory because they, allegedly on the basis of their age, had been placed in positions on that new seniority list inferior to the ones they otherwise would have occupied, constitutes a "continuing violation" of the Age Discrimination in Employment Act ("ADEA") tolling indefinitely that Act's statute of limitations, where the plaintiffs' relatively inferior placement on that seniority list and its consequences were known to them at the time of the seniority list's creation and first implementation.

2. Whether the Federal Aviation Act deprives a district court of jurisdiction to entertain a claim to the effect that aspects of an airline's seniority system integrated after a merger violated plaintiffs' rights under ADEA where those aspects had been the subject of plaintiffs' prior challenge to that seniority system made before the Civil Aeronautics Board and that Board had upheld the seniority system in an order that had not been appealed under the terms of the Federal Aviation Act.

THE PARTIES TO THE PROCEEDING

The parties to the proceeding are those listed in the caption except that all of the respondents are listed at pages 27-37 of Appendix 1 to this petition. Petitioner Pan American World Airways, Inc. is a wholly owned subsidiary of Pan Am Corporation.

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OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals, which reversed in relevant part the dismissal of this action by the District Court for the Southern District of New York, has been officially reported at 771 F.2d 635, and is set out in Appendix 1. No written opinion was rendered by the District Court for the Southern District of New York; the transcript of the District Court's oral opinion is set out in Appendix 2.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of which review is sought was entered on August 22, 1985. No application for an extension of time to file this petition has been made. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This Appeal involves the interpretation of Section 7(d)(2) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §626(d)(2), which reads in relevant part as follows:

> No civil action may be commenced by an individual under this section [of ADEA] until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed –
>
> . . .
>
> (2) ... within 300 days after the alleged unlawful practice occurred ...;

and section 1006 of the Federal Aviation Act, 49 U.S.C. §1486, the text of which is set out in Appendix 3.

STATEMENT OF THE CASE

In this case plaintiffs have complained principally that a seniority list implemented following the merger of petitioner Pan American World Airways, Inc. ("Pan Am") and the former National Airlines ("National"), discriminated against them on the basis of their age in violation of the Age Discrimination in Employment Act, ("ADEA") 29 U.S.C. §621 *et seq.** (The

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* The complaint also alleges a pendent state age discrimination claim, and various other federal claims; the dismissal of the latter claims was affirmed by the Court of Appeals.

plaintiffs are several hundred Pan Am pilots who, before the Pan Am-National merger, had been with Pan Am.) That integrated seniority list was made necessary because Pan Am, as a condition of the Civil Aeronautics Board's ("CAB") approval of Pan Am's merger with National, was required to comply with Labor Protective Provisions ("LPPs") the CAB had issued in connection with its approval, which Provisions (at Section 3) mandated that the separate seniority lists of pre-merger Pan Am and pre-merger National personnel be integrated "in a fair and equitable manner."

To accomplish that integration with respect to the three classifications of cockpit personnel (*i.e.*, captains, first officers, and flight engineers) petitioners Air Line Pilots Association, International ("ALPA"), the union representing the merged carrier's captains and first officers (collectively termed 'pilots"), and Flight Engineers International Association, Pan Am Chapter ("FEIA"), the union representing the merged carrier's flight engineers, entered into an agreement whereby representatives of four groups of employees (pre-merger Pan Am pilots, pre-merger National pilots, pre-merger Pan Am flight engineers, and pre-merger National flight engineers) would be the parties to a binding arbitration in which the arbitrator would devise an integrated seniority system. Pan Am was not a party to that agreement and was not a party to the arbitration. Nevertheless, after the arbitrator (Lewis Gill) issued his award in March, 1981, a copy of which was sent that month to every pilot and flight engineer, Pan Am agreed (in June of 1981) to accept without change this integrated seniority system Mr. Gill had devised. Thereafter, Pan Am constructed an integrated seniority list pursuant to the Gill award, had it posted in August of 1981, and by October of that year all Pan Am flying was pursuant to the Gill award's integrated seniority list.

The Gill seniority system, to the extent here relevant, called for an integrated seniority list for pilots that was, in its highest and lowest sections, constructed on the basis of length of

service or date of hire; the middle portion of the pilots' list was constructed on a ratio method whereby a (pre-merger) National pilot was inserted on the list after every three or every four (pre-merger) Pan Am pilots, based on their relative positions in the separate pre-merger lists. Plaintiffs in this proceeding challenge the ratio-method portion of the pilots seniority list as constructed under the Gill award claiming that use of the ratio method, as opposed to length of service or date of hire, discriminates against them on the basis of their age because the pre-merger National pilots inserted in the integrated list on a ratio basis are younger than the pre-merger Pan Am pilots among whom they are being inserted. (The merged flight engineers seniority list created by the Gill award did not use a ratio method and is not challenged.)

Relative position on the pilots seniority list as constructed pursuant to the Gill award determined, from the moment the list was first implemented by Pan Am, virtually every aspect of a pilot's employment. Where one was put determined every pilot's relative exposure to "furlough" (*i.e.*, lay-off); every pilot's monthly "lines of flying" (that is, who flies specific trips on specific days each month) and vacations; and every pilot's opportunities to transfer to different aircraft, bases, and cockpit positions (that is, captain, first officer, or flight engineer) in a process know as a "proffer," which transfer affects a pilot's pay immediately as pay is principally determined by the size of the aircraft flown and the cockpit position occupied.

Plaintiffs, who had been sent copies of the Gill award in March, 1981, formed a group ("PAPF," Pan American Pilots Fighting) that petitioned the CAB in July of 1981, *i.e.*, after Pan Am had announced it would accept the Gill award but shortly before the Gill award seniority list was posted and put into full effect, to set aside the Gill award. PAPF asserted to the CAB that, as a matter of law, the Gill award's seniority system was not "fair and equitable" as Section 3 of the CAB's Labor Protective Provisions required in that the portion of the pilots seniority list generated by a ratio method unfairly and

inequitably disadvantaged them, pre-merger Pan Am pilots who had more years of service (and who were older) than the pre-merger National pilots among whom they were inserted. The plaintiffs here claimed, through PAPF, that they were lower on the seniority list than they should be. The CAB, in its Order 82-4-75, adopted April 15, 1982, denied PAPF's petition and found the Gill seniority list, and specifically the portion constructed on a ratio method, to have been fairly and equitably integrated. No appeal of that CAB Order was ever taken to a court of appeals pursuant to 49 U.S.C. §1486(a).

Following Pan Am's implementation of the Gill award's seniority list in 1981, there were no pilot furloughs until 1983. In connection with the fifth "proffer" under the Gill award seniority list, in early 1983 Pan Am announced that there would be lay-offs of cockpit crew members. Following the announcement of those furloughs in which 102 cockpit crew members were eventually furloughed in March and June of 1983, (three of whom were plaintiffs and the remaining 99 were all pre-merger National flight crew members and thus not part of the group of plaintiffs in this case), a number of plaintiffs filed charges of age discrimination with the EEOC. The earliest such charge was filed on April 12, 1983, some 18 months after the integrated seniority list was implemented by Pan Am in October of 1981. If these 1983 furloughs had been necessary in October of 1981, they would have been based on the same Gill award seniority list posted in August, 1981.

This action was commenced on March 7, 1984, in the United States District Court for the Southern District of New York. Defendants moved to dismiss on the grounds that plaintiffs' ADEA claims were untimely because ADEA requires, at the most, that age discrimination charges be filed with the EEOC no later that 300 days "after the alleged unlawful employment practice occurred" (29 U.S.C. §626(d)(2)), and, in this case, plaintiffs had waited at least a year and a half. In addition, the defendants moved to dismiss on the grounds that this lawsuit

constitutes an impermissible collateral attack on a CAB order, which order had found the seniority system at issue to have been fairly and equitably integrated, and which order had not been appealed.

The District Court (Ward, J.) dismissed the complaint in its entirety solely on the grounds that it was an impermissible collateral attack on a CAB order; (the District Court did not reach the timeliness question). Plaintiffs appealed and the Court of Appeals for the Second Circuit, to the extent here relevant, reversed, holding that a claim under ADEA was not foreclosed by the CAB order in this case. In addition, the Second Circuit found plaintiffs' ADEA claim to be a "continuing violation," thereby making timely the EEOC charges individual plaintiffs may have filed, on the theory that the mere continued maintenance of an allegedly discriminatory seniority list is *per se* a "continuing violation" of ADEA.

ARGUMENT

I. SO MUCH OF THE DECISION OF THE SECOND CIRCUIT AS CONCLUDED THAT ADOPTION OF A SENIORITY LIST THAT IS ALLEGEDLY AGE DISCRIMINATORY CONSTITUTES A CONTINUING VIOLATION OF THE ADEA AS LONG AS THE LIST IS MAINTAINED SHOULD BE REVIEWED BY THE SUPREME COURT BECAUSE IT DECIDES AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT AS WELL AS OTHER FEDERAL COURTS OF APPEALS.

The integrated seniority list at issue in this case was created in 1981 as the product of a binding process undertaken by the four unions representing Pan Am's pilots and flight engineers that Pan Am accepted, made part of its collective bargaining agreements with the unions, and put into use. The record is

undisputed that, in 1981, shortly after Pan Am accepted the arbitrated seniority system, it posted the new seniority list and, still in 1981, began implementing it: every cockpit assignment determining which individuals hold which of Pan Am's three cockpit positions on which kind of aircraft (which assignment determines monthly pay) and every monthly schedule of flying and of vacations (*i.e.*, who flies where, and when), starting no later than October of 1981, were based on the new seniority list. The record is also clear that, while there were no furloughs under the new list until 1983, had furloughs been necessary in late 1981 or in 1982, those furloughs would have been accomplished under the new seniority list that, from its inception, had put the pilots on notice as to their relative exposure to furloughs. There is also no doubt in the record that the plaintiffs were aware of the new seniority list and its real and potential impact on them; among other things *in 1981* plaintiffs challenged as "unfair and inequitable" in a proceeding before the Civil Aeronautics Board the same portion of the new pilots list they challenge here on essentially the same grounds – the consequences of the "ratio method."

What plaintiffs complain about in this lawsuit, as they complained to the CAB, is their relative position on the new seniority list. They claim, only with respect to that portion of the new seniority list created by a ratio method (which is based on one's relative position on the separate pre-merger seniority lists instead of a direct date of hire or length of service calculation), that they were placed lower on the integrated seniority list than younger pilots (from National Airlines) and that they should be placed higher on that list than those younger (National Airlines) pilots.

Under the ADEA, plaintiffs had, at the most, 300 days from the time the wrongful "employment practice" of which they complain to file discrimination charges with the EEOC (29 U.S.C. §626(d)(2)). As the merged seniority system was put into place, at the latest, by October of 1981, the ADEA would

require an EEOC charge to be filed by August of 1982; none was filed until April of 1983 following the first announcement of lay-offs under the new list, as a result of which three of the plaintiffs came to be furloughed. The Second Circuit concluded that those EEOC charges were timely on the theory that plaintiffs' claim was properly viewed as one attacking the construction of a seniority list and thus a "continuing violation" for as long as that list remains in use. This conclusion, however, is contrary to the reasoning of this Court's decisions in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *United Air Lines, Inc. v. Evans*, 431 U.S. 552 (1977).

In the *United Air Lines v. Evans* case, plaintiff Evans, a flight attendant, charged that United's seniority system illegally discriminated against her in that she was, upon rehire, not given the higher seniority position she "deserved" to make her whole for past sex discrimination. She alleged that United's seniority system constituted a continuing violation of Title VII in that each month her "wages; the duration and timing of vacations; rights to retention in the event of layoffs...and rights to preferential selection of flight assignments" (431 U.S. at 555, n. 5) were affected by her "wrongful" place in the seniority system.

This Court concluded that Evans' claim was time-barred, and not based upon a true continuing violation. The Court found that while the seniority system gave present effect to a past act of discrimination, United

> "was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed ... [T]he emphasis should not be on mere continuity; the critical question is whether any present *violation* exists ..." (431 U.S. at 578-79; emphasis in original.)

Similarly, in *Delaware State College v. Ricks, supra*, 449 U.S. at 258, this Court set out the basic rule for determining *when* a discriminatory practice occurs for purposes of statutes of limitations, stating that "'[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the *consequences* of the acts become most painful,'" quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979), emphasis in original).

Ricks and *United Air Lines v. Evans* should be applied to this ADEA case.* Such application would time-bar this action because the wrongful practice of which plaintiffs really complain is their being placed too low on a seniority list in 1981 (and the other harms plaintiffs allege, including the furloughing of three of them in 1983 that precipitated their EEOC charges, are merely consequences of the putting into use of that list in 1981). Plaintiff's claim is thus not a proper example of "continuing violation."

The Second Circuit's decision here also conflicts with decisions from other circuits to the effect that the continued use of an allegedly erroneously or defectively or discriminatorily constructed employee list does *not* constitute a continuing violation on the analysis that, as in this case, what is continuing is merely the *consequence* of a single, specific, and identifiable past act: the development of a list of employees. See, *e.g.*, *Bronze Shields, Inc. v. N.J. Dept. of Civil Service*, 667 F.2d 1074, 1080-1084 (3d Cir. 1981), *cert. den.* 458 U.S. 1122 (1982) (Title VII) (the "specific, identifiable act, the promulgation of the hiring roster," was the true unlawful practice, not the employment decisions made later on the basis of the roster); *Lockhart v.*

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* While *Ricks* and *United Air Lines v. Evans* were decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000, "the ADEA and Title VII share a common purpose" (and the same limitations period for filing EEOC charges) (*Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 [1979]). See, *e.g.*, *Chardon v. Fernandez*, 454 U.S. 6 (1981), applying *Ricks* to a case arising under 42 U.S.C. §1983.

Firestone Tire & Rubber Co., 454 F.Supp. 191 (E.D. Va. 1978) (ADEA); and more generally, *Benson v. General Motors Corp.*, 716 F.2d 862, 863-864 (11th Cir. 1983) (breach of duty of fair representation claim); *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 592-594 (9th Cir. 1981), *cert. den.* 459 U.S. 1200 (1983) (ADEA); *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1057 (5th Cir. 1979) (Title VII); *Farris v. Board of Ed. of City of St. Louis*, 576 F.2d 765 (8th Cir. 1978) (Title VII);* *contra*, *Morelock v. NCR Corp.*, 586 F.2d 1096 (6th Cir 1978), *cert. den.* 441 U.S. 906 (1979), which, however, appears inconsistent with the Sixth Circuit's later decision in *Trabucco v. Delta Airlines*, 590 F.2d 315 (6th Cir. 1979).

The question of the proper application of the "continuing violation" doctrine to seniority systems under the ADEA is an important one as a matter of both statutory interpretation and public policy. First of all, ADEA was designed to have discrimination claims brought to the attention of an administrative agency within, at the most, three hundred days in order to encourage conciliation and "expeditious disposition" of those claims before they become stale. See, *e.g.*, *Oscar Mayer Co. v. Evans*, *supra*, 441 U.S. at 757. Second, more is at stake in a challenge to a seniority system than the interests of plaintiffs, such as those here, who felt in 1981 *some* impact of a new seniority system but who chose to wait one and a half to two years before filing charges of violation of the ADEA following a *more* serious impact upon them of that seniority system. Under the reasoning of the Second Circuit's decision in this case, *every employee* in a seniority system, and *every employer* with a seniority system, may now never be certain as to the final legality under the ADEA of that system. And an employee may wait *decades* before challenging it, notwithstanding the fact that *that*

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* The Second Circuit's decision concerning timeliness in this case is also neither reconciled with, nor reconcilable with, such earlier cases from the Second Circuit as *Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064 (2d Cir. 1977), and *Bertheas v. Trans World Airlines, Inc.*, 450 F.Supp. 1069 (E.D.N.Y. 1978).

employee knew he had been affected by that seniority system from the time it was first put into use because, among other things, it inevitably affected, from the date of first use, every paycheck and work assignment and his relative exposure to lay-off, whenever that lay-off might occur.

It has long been recognized that many different kinds of seniority systems may be valid (see, *e.g.*, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338-339 [1953]) and that seniority integration following mergers "poses notoriously difficult problems" (*Truck Drivers and Helpers, Local 568 v. N.L.R.B.*, 379 F.2d 137, 140 [D.C. Cir. 1967]). But once a seniority system has been established and, as here, made a part of a collective bargaining agreement, it becomes of paramount importance. "More than any other provision of a collective agreement ... seniority affects the economic security of the individual employee covered by its terms." (Benjamin Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1535 [1962].) And once a seniority system is established, rights and reasonable expectations are created for "perfectly innocent employees" and, of course, for their employers. See, *e.g.*, *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 780-81, 788-89 (1976, Burger, C.J., dissenting in part, and Powell, J., dissenting in part); *Zdanok v. Glidden Co.*, 288 F.2d 99, 104 (2d Cir. 1961), *aff'd sub nom. Glidden Company v. Zdanok*, 370 U.S. 530 (1962).

Employees plan their careers, and employers their corporate destinies, by making some assumptions that seniority systems fix, or at least make predictable, important rights and obligations. The Second Circuit's decision in this case as to the timeliness of plaintiffs' ADEA claims destroys that limited amount of economic predictability in an uncertain world; that decision calls out for review by this Court.

II. SO MUCH OF THE DECISION OF THE SECOND CIRCUIT AS CONCLUDED THAT PLAINTIFFS' ADEA CLAIMS IN THE DISTRICT COURT WERE NOT AN IMPERMISSIBLE COLLATERAL ATTACK ON AN UNAPPEALED ORDER OF THE CIVIL AERONAUTICS BOARD THAT CONCLUDED THAT THE SENIORITY SYSTEM IN DISPUTE HERE HAD BEEN CREATED IN A FAIR AND EQUITABLE MANNER SHOULD BE REVIEWED BY THE SUPREME COURT BECAUSE IT DECIDES AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT AS WELL AS OTHER FEDERAL COURTS OF APPEALS

In Section 408 (b) of the Civil Aeronautics Act of 1938 (then codified at 49 U.S.C. §488(b)), and in its successor statute, Section 408(b) of the Federal Aviation Act of 1958, 49 U.S.C. §1378(b), Congress entrusted to the *exclusive* jurisdiction of the CAB the authority to approve airline mergers "consistent with the public interest" and to regulate those mergers with such terms and conditions "as it shall find to be just and reasonable."* Under this broad mandate of exclusive authority the CAB required Pan Am, as a condition of the CAB's approval of the Pan Am-National Airlines merger, to integrate seniority lists pursuant to the terms of Section 3 of the CAB's Labor Protective Provisions ("LPPs"), which section called for that integration to be accomplished in a "fair and equitable manner."

In light of Section 3 of the CAB's LPPs, plaintiffs, in the form of an organization called PAPF, petitioned the CAB to vacate

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* As a result of the Civil Aeronautics Board Sunset Act of 1984, Public Law 98-443, 98 Stat. 1703, the CAB's merger authority has now been transferred to the Department of Transportation.

the Gill award on the grounds that it did not produce a fair and equitable merged seniority system in that the ratio method portion of the integrated pilots list put some National pilots ahead of some Pan Am pilots with more years of experience; and although the PAPF did not specifically claim that such placement violated *ADEA*, PAPF did bring to the CAB's attention the fact that the Pan Am pilots disadvantaged by the ratio method were older than the National pilots who were advantaged by it. The CAB, after extensive briefing on PAPF's petition (as well as on the petition of another group of pre-merger Pan Am pilots called the "Janus group," which represented pilots who were on furlough, and the petition of some pre-National pilots who sought "enforcement" of the Gill award), sustained the Gill award as being fair and equitable within the meaning of Section 3 of the LPPs. The Federal Aviation Act, at 49 U.S.C. §1486, provides that review of such a CAB order may be had only by appeal to the Court of Appeals, which "shall have *exclusive jurisdiction* to affirm, modify, or set aside the order..." (49 U.S.C. §1486(d), emphasis added); no such appeal was taken.

The exclusive jurisdiction Congress gave the CAB with respect to airline mergers empowered the CAB to reject integrated seniority systems that were not "consistent with the public interest" or not otherwise "just and reasonable" or "fair and equitable." There should be no doubt that a seniority system that was violative of ADEA would be, *per se*, inconsistent with the public interest, and unjust, and the CAB would have a statutory duty to *reject* that seniority system. In light of the exclusive statutory authority vested in the CAB, and the "exclusive jurisdiction" of a Court of Appeals with respect to review of CAB orders, the only further review of that seniority system would be an appeal of the CAB's order to the Court of Appeals; as the District Court concluded below, this action should thus be deemed an impermissible collateral attack on that CAB order. See, for example, *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334-337 (1958), in which this Court observed with respect to a comparable order of the Federal Power Commission:

> "Upon judicial review of the Commission's order, *all objections to the order ... must be made in the Court of Appeals or not at all.* For Congress, acting within its powers, has declared that the Court of Appeals shall have 'exclusive jurisdiction' to review such orders ..." (357 U.S. at 336-37, emphasis added).

Accordingly, a federal district court did not have the subject matter jurisdiction to adjudicate actions such as the one commenced here by plaintiffs (some two years after the CAB issued its order upholding the fairness and equity of the seniority system at issue). See, also *Callanen Road Improvement Co. v. United States*, 345 U.S. 507, 512-513 (1953); *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 381-382 (1922).

While none of this Court's decisions has precisely involved the question of an ADEA claim's being raised after the CAB had passed on the fairness and equity of a seniority system, that precise question was raised and decided in *Carey v. O'Donnell*, 506 F.2d 107 (D.C. Cir. 1974), *cert. den.* 419 U.S. 1110 (1975), a decision the Second Circuit expressly declined to follow. In *Carey*, the court observed:

> "Viewed objectively, the actions below, although couched in terms of violations of the RLA [Railway Labor Act, 45 U.S.C. §151 *et seq.*] and the ADEA, are essentially collateral attacks on the integrated seniority list as incorporated in the ALPA Delta agreement of 26 October, 1972, approved by the Civil Aeronautics Board, and reviewed by this court. We perceive no necessity for additional review, not contemplated by the Federal Aviation Act, in the district court or any other forum." (506 F.2d at 110).

To comparable effect are *Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973), and *Oling v. Air Line Pilots Ass'n*, 346 F.2d 270 (7th Cir.), *cert. den.* 382 U.S. 926 (1965).

Seniority integration is a complex process, and, almost by definition, no such integration can please everyone subject to it. Nevertheless, the speedy and final integration of seniority lists following a merger is essential so that the merged carrier can operate as a merged carrier rather than as two carriers with a common owner. The CAB had long taken the position that seniority lists must be integrated "as speedily as possible" if the public interest in promoting the adequacy and efficiency of air transportation is to be served. See, *North Atlantic Route Transfer Case (I)*, 12 C.A.B. 124, 133 (1950).

Permitting serial challenges, in various forums, to the fairness and equity of an integrated seniority system would render the *speedy* (and final) determination of post-merger seniority impossible. An airline employee, unhappy with his position on the integrated seniority list, could wait – even if his claim were not deemed to be one of a "continuing violation" – up to *three* years after the list is adopted to sue under, for example, the Age Discrimination in Employment Act (Section 7(e) of the ADEA, 29 U.S.C. §626(e), incorporating Section 6 of the Portal-to-Portal Act, 29 U.S.C. §255) or even up to six years (in New York State) to sue on, for instance, a fraud theory (N.Y. CPLR §213), unless he is *limited* to a challenge to the list heard by the CAB (which procedure of course permits judicial review by a Court of Appeals, 49 U.S.C. §1486). A better way to stymie the statutorily required "public interest" underlying the CAB's approval of an airline merger would be hard to imagine; no airline employee, and no airline, could be confident that a seniority system, approved by the CAB and which they all have lived and planned under for years, may someday be found, retroactively, to be unlawful by someone else. As the court in *Hyland v. United Airlines, Inc.*, 254 F.Supp. 367 (N.D. Ill. 1966), noted: "The parties affected by the CAB merger order cannot be required to answer in different forums at different times on different charges for actions taken under the CAB merger umbrella." *Id.* at 372. The need for speedy (and, inherently, final) integration of seniority lists requires that challenges to an adopted seniority integration scheme, once presented to the CAB, may not be refiled in other guises elsewhere.

The Second Circuit, in permitting *de novo* review under ADEA of essentially the same claims that were raised before the CAB (albeit claims that were not given an explicit ADEA label) misconstrued the primary and exclusive jurisdiction given to the CAB by the Federal Aviation Act to adjudicate the kinds of seniority system claims plaintiffs have already raised before the CAB. *De novo* review, moreover, can only encourage a profusion of wasteful serial litigation on complex matters that are within the competence of the federal agency given the jurisdiction by Congress to resolve such issues. Review of the Second Circuit's decision is thus called for.

Conclusion

For the reasons outlined above a writ of certiorari should issue to review the judgment of the Court of Appeals and, accordingly, this petition should be granted.

November 19, 1985

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 875 — August Term, 1984

(Argued: March 5, 1985 Decided: August 22, 1985)

Docket No. 84-7972

JOHN C. COOK, et al. (listed in Appendices A and B),
Plaintiffs-Appellants,

—against—

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,
Respondents-Appellees.

Before:

MANSFIELD, NEWMAN and KEARSE, *Circuit Judges.*

Appeal from an order of the Southern District of New York, Robert J. Ward, *Judge*, dismissing for lack of subject matter jurisdiction claims of age discrimination, 29 U.S.C. §§ 623-31, and violation of the New York Human Rights Law, N.Y. Exec. Law, §§ 290, *et seq.*, and of the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, based on adoption and implementation of seniority lists for pilots and flight engineers established by consensual arbitration in connection with approval by the Civil Aeronautics Board of a merger of two airlines.

Affirmed in part, reversed in part, and remanded for further proceedings.

JEFFREY C. LONDA, Esq., Houston, TX (Butler & Binion, Houston, TX; Robert E. Cohn, Esq., Kevin F. Flynn, Shaw, Pittman, Potts & Trowbridge, Washington, DC; Jeffrey Bernbach, Esq., New York, NY, of counsel), *for Appellants.*

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ROBERT A. MCCULLOUGH, Esq., Washington, DC (Gary Green, Esq., Air Line Pilots Association, Int'l, Washington, DC, of counsel), *for Appellee Air Line Pilots Association, Int'l.*

ASHER W. SCHWARTZ, Esq., New York, NY (O'Donnell & Schwartz, New York, NY, of counsel), *for Appellees Flight Engineers' International Association, Pan Am Chapter and Flight Engineers' International Association, AFL-CIO.*

MANSFIELD, *Circuit Judge*:

John C. Cook and more than 400 other current or former Pan American Pilot-Flight Engineers, all over age 40, appeal from a judgment of the Southern District of New York, Robert J. Ward, *Judge*, dismissing their complaint against Pan American World Airways, Inc. ("Pan

Am") and four union defendants—Air Line Pilots Association ("ALPA"), International; ALPA, Pan Am Chapter; Flight Engineers' International Association ("FEIA"); FEIA, Pan Am Chapter—for lack of subject matter jurisdiction. Their complaint alleged that, by adopting and implementing a 1981 seniority list integrating the pilots and flight engineers of two merged airlines, Pan Am and National, the defendants had violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623-31 (1982), and New York Human Rights Law ("NYHRL"), N.Y. Exec. Law §§ 290, *et al.* (McKinney 1982 & Supp. 1984-85), and that defendant unions had in addition violated the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1982). Finding that plaintiffs' action constituted an impermissible collateral attack on a final order of the Civil Aeronautics Board ("CAB"), not appealed in accordance with the provisions of § 1006 of the Federal Aviation Act, 49 U.S.C. § 1486(a), Judge Ward dismissed their complaint for lack of subject matter jurisdiction. We affirm in part, reverse in part, and remand for further proceedings.

This case arises out of Pan Am's acquisition of control of and merger with National Airlines, effective January 19, 1980. The merger was approved by the CAB pursuant to 49 U.S.C. § 1378(b), which empowers it to determine whether mergers are "consistent with the public interest" and to approve them "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe". The CAB conditioned its approval of the merger upon compliance with its labor protection provisions ("LPPs"), *see Flying Tiger-Slick Merger Case*, 18 C.A.B. 326 (1954) (approving airline merger but imposing labor protective conditions and retaining jurisdiction), and retained juris-

diction "to make such amendments, modifications, and additions to the labor protective conditions as the circumstances may require. . . ." CAB Order 79-12-164, at 1. Two of the LPPs are central to this case:

> "Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.
>
> * * * * *
>
> "Section 13(a). In the event that any dispute or controversy * * * arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator * * *. The deicsion of the arbitrator shall be final and binding on the parties."

On March 19, 1980, the four unions involved—the ALPA Master Executive Council ("MEC") for the Pan Am pilots, ALPA's MEC for the National Pilots, FEIA's Pan Am Chapter, and FEIA's National Chapter—agreed on a procedure for determining how to integrate the seniority lists. In the event that agreement on seniority integration should not be reached within a limited period arbitration was to be "mandatory," and "[t]he Award of the Arbitrator shall be final and binding as to all flight deck operating crew members and shall be defended by the parties." March 19, 1980, Agreement ¶ 8(j).

After unsuccessful inter-union negotiation and mediation on seniority integration, arbitration took place before Lewis M. Gill, whom the parties had designated as their first choice. The four union representatives participated fully in the arbitration hearing, which lasted approximately 35 days and closed on January 14, 1981. Arbitrator Gill subsequently held 15 days of executive session with the union parties. The final record contained over 4,700 transcript pages and hundreds of exhibits. Arbitrator Gill issued his Award on March 12, 1981.

In his lengthy opinion explaining the award Gill identified several issues. First, the "cross-bidding" arrangements between pilots and flight engineers at Pan Am were entirely different from those at National. Although both airlines required three crewmen in the cockpit, Pan Am used a pilot/flight engineer ("PFE") as the third crewman, while National used an engineer who was not qualified as a pilot. Pan Am accordingly maintained a single seniority list, with PFEs being allowed to bid for pilot vacancies and fall back to engineer positions, bumping less senior PFEs to avoid furlough. National, however, maintained two independent seniority lists, one for its pilots and one for its flight engineers, and did not permit cross-bidding or displacement between the groups.

Having decided not to disturb the premerger cross-bidding situation, Gill constructed two integrated lists. One, the "Pilot List," contained National pilots and all Pan Am airmen; the other, the "Engineer List," contained National engineers and all Pan Am airmen. Gill then directed that cross-bidding be

> "[a]s before on each airline. Pam Am airmen continue cross-bidding practices vis-a-vis each other, but

> Pan Am Pilots cannot bump National Engineers. National Pilots cannot bid Engineer positions, National Engineers cannot bid Pilot positions. National Engineers to have same rights as [a small class of Pan Am engineers who did not qualify as pilots] against being displaced from Engineer seats by Pilots." (Award at IV.C.)

A second issue, labelled "explosive" by Gill, concerned the manner in which approximately 400 Pan Am pilots on furlough at the time of the merger were to be integrated. This large number of furloughees resulted from Pan Am's switch from smaller planes to B747s, the largest wide-bodied aircraft, and Pan Am's poor financial health in the preceding few years. Gill stated that this furlough situation created

> "a head-on clash over the relative equities as between large numbers of National airmen hired between 1968 and 1978 and actively employed at the time of the merger, and large numbers of these Pan Am furloughees with earlier dates of hire who still have recall rights but who brought no active jobs to the merger." (Gill Op. at 8).

Gill's solution was to calculate the Pan Am furloughees' length of service at the time of their recall, and to slot them into the list by comparing their length of service with that of the active airmen at that time. (An exception was made for about 34 furloughed Pan Am pilots who had received notice of recall before January 19, 1980). He indicated a willingness, had the parties (or the "JANUS" group, representing the furloughees) submitted a proposal estimating the likely dates of recall of the furloughees and the likely length of service of the active pilots at those dates, to integrate the furloughees

on that basis. However, no such proposal was forthcoming "[p]erhaps because of the difficulties in fashioning projections of that nature." *Id.* at 41. While noting that his solution to the furloughee problem might seem novel, Gill observed that

> "the problem itself is novel—there has not been any previous merger case called to my attention where such massive numbers of furloughees, with such long periods of being off the property, were pitted against active airmen from the other airline who brought current jobs to the merger." *Id.* at 40.

Finally, differences between Pan Am and National created further conflicts between the interests of the various union groups. While Pan Am's fleet consisted primarily of B747s, National mostly used the smaller B727s. Although National was in "a healthy financial condition at the time of the merger," Pan Am had been in financial difficulties over the preceding few years. Because of these and other differences, the parties before Gill advocated three different methods for integrating the seniority lists: (1) the National pilots and engineers advocated "ratio" methods; (2) the Pan Am pilots a mixed length of service ("LOS") and date of hire ("DOH") method; and (3) the Pan Am engineers a straight DOH method. Under a ratio method, a certain number of identified airmen from one airline are listed followed by a similar listing of a specified number of airmen from the other airline (e.g., 1 National pilot followed by 3 Pan Am pilots). The ratios can form all or part of a master list. In the latter case the balance of the list can name airmen on a LOS and/or DOH basis.

Gill concluded that a "fair and equitable" solution required that two integrated seniority lists be constructed by different methods. He constructed the entire En-

gineer List, and the top and bottom of the Pilot list, by a straight LOS/DOH method. However, for the middle portion of the Pilot List he used a mixed-ratio method, which distributed Pan Am and National pilots in a ratio of approximately 3.25 Pan Am pilots for every one National pilot.

On March 15, 1981, ALPA mailed copies of the arbitrator's award to all the pilots and on March 25, 1981, FEIA mailed copies to the flight-engineers. On June 26, 1981 Pan American accepted the Gill award and agreed to implement it without change.

Two groups of airmen petitioned the CAB to set aside the Gill award. The Janus Group, formed at the time of approval proceedings before the CAB and representing 510 Pan Am crewmen who had been furloughed before the merger, maintained that the Gill award failed adequately to consider the interests of its members and that it was not "fair and equitable" within the meaning of the labor protection provision of CAB Order 79-12-164, at 1. The Janus Group sought a new arbitration in which it would be granted full party status.

Pan American Pilots Fighting ("PAPF"), a group of Pan American crewmen who had been employed from dates before the merger, which was formed after the arbitration award to oppose it, argued that the Gill award must be set aside because it used a ratio method to integrate the middle portion of the Pilot List. PAPF maintained that only a "time served" method of integration, either LOS or DOH, was "fair and equitable" and that use of a ratio method was inconsistent with the labor protective provisions that the CAB had imposed in approving the merger. PAPF sought a CAB order integrating the seniority list on a time served basis or renegotiation of the integration with PAPF and the Janus Group as parties.

The CAB rejected the two petitions in an order dated April 15, 1982, noting:

> "The carrier's action is wholly consistent with our long-held, and judicially approved, view that 'absent a showing of bad faith, the adoption by a carrier of an integrated seniority list proposed by the collective bargaining representatives of the employees involved amounts to the carrier having made "provisions * * * for the integration of seniority lists in a fair and equitable manner" within the meaning of section 3 of the Board's labor protective provisions.'[13] It follows, therefore, that we also dismiss Janus Group's and PAPF's petitions to set aside the award.

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[13] *Delta-Northeast Merger Case*, Order 73-1-24 at 5, *aff'd Northeast Master Executive Council* v. *CAB*, 506 F.2d 97 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110."

CAB Order 82-4-75 at 11.[1] Having concluded that resolution of the seniority integration was reached in a fair and equitable manner, the Board declined to review "the intrinsic nature of the integration system established by the award." *Id.*

The CAB further found that the Janus Group was not entitled to full party status at a new arbitration since its members' interests were adequately represented both by its own statements at several points during the arbitration and by union representation at all stages. It also rejected PAPF's claim that only a "time-served," i.e., LOS or DOH, method of integration was "fair and equitable", finding that Arbitrator Gill acted within his prerogative in using a ratio method to integrate the middle

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[1] The CAB also dismissed a "Motion for Confirmation and Enforcement of [the] Arbitration Award," filed by flight engineers formerly employed by National, as moot.

portion of the Pilot List. In making this finding, the Board again confirmed the propriety of its refusing " 'to look behind the freely negotiated list.' " *Id.* at 12 (quoting *Northeast Master Executive Council* v. *C.A.B.*, 506 F.2d 97, 105 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975)). No appeal was taken from the CAB's denial of the two petitions, even though an appeal was available under 49 U.S.C. § 1486, which provides in relevant part that "any" order of the Board "shall be subject to review by the courts of appeals of the United States" which "shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. . . ." 49 U.S.C. §§ 1486(a), (d). The statute further provides that the Board's findings, if supported by substantial evidence, shall be conclusive, 49 U.S.C. § 1486(e).[2]

The complaint in the present action, which was filed on March 7, 1984, alleged that plaintiffs were all over

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[2] We have held that for purposes of review under 29 U.S.C. § 1486(a) the word "order" should be construed liberally. *State of New York* v. *F.A.A.*, 712 F.2d 806, 808 (2d Cir. 1983). Although only final orders are reviewable, *McManus* v. *C.A.B.*, 286 F.2d 414, 417 (2d Cir.), *cert. denied*, 366 U.S. 918 (1961), we have defined a final order as one which "imposes an obligation, denies a right, or fixes some legal relationship." *Rombough* v. *F.A.A.*, 594 F.2d 893, 895-96 n.4 (2d Cir. 1979) (citing *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 112-13 (1948)). The order in the instant case meets this criterion.

Our conclusion that the CAB order denying the petitions to set aside (rather than the original CAB order approving the merger but retaining jurisdiction to ensure that the LPPs are complied with) is appealable, *see, e.g.*, *Northeast Master Executive Council* v. *C.A.B.*, *supra*, 506 F.2d at 100, and consistent with cases in which we have held orders approving a merger to be non-reviewable, *Overseas National Airways, Inc.* v. *C.A.B.*, 426 F.2d 725, 727 (2d Cir. 1970) (CAB orders refusing to expand scope of hearing non-reviewable as merely "threshold determinations," "interlocutory in nature"); *McManus* v. *C.A.B.*, *supra*, (CAB orders "relating to various procedural details" not subject to review).

age 40 and that many had, in the period April 12, 1983 to September 2, 1983, filed in various federal and state equal employment offices charges containing some or all of the allegations stated in the complaint. The complaint charged that the pilot seniority list resulting from the Gill arbitration award, which used a ratio formula "to insert large numbers of former National pilots under age 40 ahead of older and more experienced Pan Am pilots over the age of 40," ¶ 11, was first implemented on a system-wide basis on March 28, 1983, and that it had been and would continue indefinitely to be implemented. Further, the complaint maintained that on June 15, 1983, Pan Am had caused to be furloughed, under the Gill seniority integration, three of the plaintiffs.

The complaint further alleged that "[b]y using and adopting, and by indefinitely continuing to use and adopt, the above-described seniority system in making employment decisions" defendant Pan Am has engaged in "willful and continuous violation" of both § 4(a) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a), and § 296 of the New York Human Rights Law, N.Y. Exec. Law § 296; and that the four defendant unions, "[b]y actively supporting and/or acquiescing in, and by indefinitely continuing to actively support and/or acquiesce in, the above-described seniority system," had engaged in "willful and continuous violation" of § 4(c) of the ADEA, 29 U.S.C. § 623(c), and § 296 of the New York Human Rights Law, and that they had thereby breached their duty under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, to fairly represent the interests of the plaintiffs. Plaintiffs sought injunctive relief, including an order directing defendants to construct and implement a seniority system which eradicated the effects of the allegedly unlawful employment practices described;

damages to make them whole; liquidated damages; and attorneys' fees and costs.

Pan Am sought dismissal of the complaint on the grounds that the ADEA cause of action was time-barred and that the pendent claim should be dismissed for lack of jurisdiction. ALPA and FEIA also moved for dismissal on the grounds that plaintiffs' ADEA and duty of fair representation claims were time-barred and that the complaint constituted an impermissible collateral attack on a final order of the CAB.

At the end of a hearing held on October 31, 1984, Judge Ward issued an oral opinion and an order dismissing plaintiffs' complaint on the ground that it constituted an impermissible collateral attack on a final order of the CAB that had not been appealed in accordance with the provisions of § 1006 of the Federal Aviation Act, 49 U.S.C. § 1486(a). This appeal followed.

DISCUSSION

The principal issue is whether the integrated seniority list formulated by the parties' mutually-selected arbitrator pursuant to the CAB's labor protection provisions may, notwithstanding the CAB decision, be challenged through the present lawsuit on the ground that it violates plaintiffs' rights under the ADEA and the New York Human Rights Law. The starting point for consideration of that issue lies in Supreme Court decisions upholding *de novo* judicial determination of claims asserted under similar federal statutes, *McDonald* v. *City of West Branch*, — U.S. —, 104 S.Ct. 1799 (1984) (civil rights claim under 42 U.S.C. § 1983); *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (Minimum wage provisions of Fair Labor Standards Act); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII

action). *Gardner-Denver* has particular relevance for the reason that the prohibitions of the ADEA, enacted only a few years after Title VII, are in terms almost identical to those of Title VII, *Hodgson* v. *First Fed. Sav. & Loan Ass'n*, 455 F.2d 818, 820 (5th Cir. 1972), and both laws have received parallel interpretations. *Aronsen* v. *Crown Zellerbach*, 662 F.2d 584, 589 (9th Cir. 1981), *cert. denied*, 459 U.S. 1200 (1983). *See also Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756-58 (1979).

In *Gardner-Denver*, *supra*, the Supreme Court unanimously held that, since Congress intended to give federal courts parallel jurisdiction over a *de novo* proceeding, an employee's statutory right under Title VII to obtain judicial relief from discrimination in his employment is absolute and not barred or waived by his resort to the grievance-arbitration machinery of a collective-bargaining agreement. Congress, said the Court, intended

> "to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." *Id.*, at 48-49.

The Court noted, as reasons for its decision, that the arbitrator's role was "to effectuate the intent of the parties rather than the requirements of enacted legislation," *id.* at 56-57, that the arbitrator's competence "pertains primarily to the law of the shop, not the law of the land," *id.* at 57, that the record of arbitration is usually

not as complete as that of a court proceeding, that the rights and procedures common to civil trials are often limited or unavailable and that arbitrators have no obligation to give their reasons for an award. These reasons were echoed and adopted in *McDonald* in support of the Court's holding that a federal court may not, in a civil rights action under 42 U.S.C. § 1983, give preclusive effect to an arbitration award, concluding that arbitration is not the equivalent of a "judicial proceeding" within the meaning of 28 U.S.C. § 1738. 104 S.Ct. at 1804.

Some of the Supreme Court's reasoning may not be as fully applicable to the arbitration proceeding in the present case as it was in *Gardner-Denver* and *McDonald*. For instance, the fairness of integrated seniority may have been resolved by the arbitrator consistently with the aims of ADEA. But we are persuaded that this difference in shading is not of sufficient significance to outweigh the statutory entitlement to the *de novo* determination provided for by Congress in its enactment of ADEA.

There remains, therefore, the question of whether, since Arbitrator Gill's order was appealed as of right to the CAB by way of a motion to set it aside and the CAB's resulting order was in turn appealable to a court of appeals, vested by statute with "exclusive jurisdiction" to hear such appeals, the principles of *Gardner-Denver* and *McDonald* still apply or whether the order of the CAB must be given collateral estoppel or preclusive effect. The answer turns largely on whether the issue before the administrative agency, in this case the CAB, was the same as that raised in the later court proceedings and whether the administrative agency had the authority to decide that issue. In *City of Tacoma* v. *Taxpayers*, 357 U.S. 320 (1959), relied on by the district court, collateral attack was barred when the issue raised by the State of

Washington in a proceeding before the state court, the legality and effect of a license issued by the Federal Power Commission, was the same as that raised by it earlier before the Commission itself, which was fully competent to resolve the issue, and was decided upon appeal by the Court of Appeals, which had "exclusive jurisdiction" to review the Commission's order. In *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377 (1922), also cited by the district court, collateral attack upon an order of the Interstate Commerce Commission was barred since the issue raised in the later court proceeding was one which the ICC was explicitly empowered to decide.

On the other hand, when the administrative agency is neither authorized nor required to decide the issue later raised in a separate action, the court has jurisdiction to entertain the latter claim. In *Beins* v. *United States*, 695 F.2d 591 (D.C. Cir. 1982), for instance, the court upheld the district court's jurisdiction to entertain a pilot's claim under the Federal Tort Claims Act against the government for damages based on alleged negligence of the Federal Aviation Commission. The government's contention that the plaintiff's sole remedy was an appeal to a court of appeals of the FAA's denial of medical certification was rejected on the ground that the determinations made by a court of appeals "are distinct conceptually from a finding of negligence." *Id.* at 598.

Applying these principles here, the record does not reveal any CAB ruling on the question now raised by the plaintiffs of whether the integrated seniority lists formulated by Arbitrator Gill were unfair as age-discriminatory. The CAB made no independent inquiry into possible age discrimination and held no evidentiary hearing. Indeed, none of the parties presented an issue based on age

discrimination to the Board. In opposition to a motion by National Flight Engineers to confirm the award and in support of motions to set it aside, the Janus Group and PAPF argued only that their interests had not been adequately considered by the arbitrator, and that the ratio method used for part of the arbitrator's integrated seniority lists, in contrast to "time served" methods (DOH and LOS), was not a fair and equitable basis for integration.

Nor did the CAB indicate that it would have considered itself authorized to rule upon such an issue (unfairness based on age discrimination) if it had been raised. On the contrary, although it reviewed in detail Arbitrator Gill's 59-page decision, it repeatedly made clear that it considered its authority limited to deciding whether the arbitration had been conducted "in a fair and equitable *manner*" (LPP § 3; emphasis added), i.e., as a procedural matter, rather than whether the terms of the award were substantively equitable. In short, it focused its attention on the procedures used by the parties to negotiate the seniority integration issue, to arrive at terms for arbitration of the issue when the negotiation failed, and to assure fair representation of union members in the arbitration itself.

> "Our authority, however, over arbitration voluntarily undertaken by employee representatives in connection with a Board-approved acquisition or merger is confined to examining whether the arbitration was fairly and equitably conducted." CAB Order 82-4-75, at 3.

The Board's limited review of the merger (of seniority lists) claimed to have violated § 3 of the LPPs is consistent with the limited jurisdiction over labor matters conferred upon it by 49 U.S.C. § 1378(b) and with the Board's own interpretation of the scope of that jurisdic-

tion, which is entitled to considerable weight. *See, e.g., Youakim* v. *Miller*, 425 U.S. 231, 235 (1976) ("The interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute."); *Manchester Environmental Coalition* v. *E.P.A.*, 612 F.2d 56, 59 (2d Cir. 1974). As the Board has noted, despite its imposition of the LPPs,

> "it has been the Board's longstanding policy that the matters encompassed herein should be resolved by voluntary agreement between the carrier and the labor groups or employees involved or, failing agreement, by arbitration. This policy with respect to seniority integration is reflected in sections 3 and 13 of the labor protective conditions." *American-Trans Caribbean Merger*, 57 C.A.B. 581, 585 (1971), *aff'd sub nom. American Airlines* v. *C.A.B.*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972). (Footnotes omitted).

The purpose and scope of the LPPs is extremely limited:

> "[W]e have characterized LPP's as 'an extraordinary intervention . . . into the employer-employee relationship.' . . . [W]e have repeatedly refused to become entangled in carrier-employee labor disputes, because our jurisdiction is limited, we lack expertise in labor relations, and there are better equipped, more competent forums available to handle labor disputes. Moreover, it is important to recognize that the primary intent of the Board's LPP's historically has been to prevent disruptions in the national air transportation system. Their purpose has not been to benefit carrier employees directly, or to avoid labor unrest with particular air carriers." *Texas International-Continental Acquisition Case*, CAB Order 81-10-66, at 11 (footnotes omitted).

In implementation of its limited authority the Board will scrutinize a freely-negotiated integrated seniority list "only on a showing of bad faith, or deliberate attempt to subvert the Board's order, or other compelling circumstances," *Delta-C&S Seniority List*, 29 C.A.B. 1347, 1349 (1959), *aff'd sub nom. Outland* v. *C.A.B.*, 284 F.2d 224 (D.C. Cir. 1960). The Board will not find § 3 of the LPP's satisfied unless it determines that the groups of employees affected have been adequately represented in formulating the list.

With these exceptions, which go to the "manner" in which the arbitration was conducted, the CAB leaves the resolution of all other issues to the parties or their mutually-selected arbitrator. Indeed, the CAB has acknowledged that a finding by it that seniority lists have been integrated "in a fair and equitable manner" does not necessarily bar petitioners from challenging the legality of the lists themselves in court. In *Delta-C&S Seniority List*, *supra*, 29 C.A.B. at 1350, it stated (after rejecting petitioners' claim that the merged list was not fair and equitable), "[w]e take no position on whether petitioners have a cause of action cognizable by the courts." *See also Pan Am-TWA Route Exchange Agreement*, CAB Order No. 80-6-95, at 4 ("We will not . . . review the merits of a challenged [seniority integration list] award, the merits including questions of law and questions of fact."). In a case in which petitioner charged that he had been subjected to age discrimination and sought damages, the CAB explicitly stated that "[a]ge discrimination is outside the scope of the LPP's." *Caribbean-Atlantic Airlines, Inc.-Eastern Air Lines, Inc., Acquisition Case*, CAB Order 80-10-65, at 2.

Thus, because of the ADEA's statutory grant of *de novo* review and the CAB's lack of authority to adjudicate

the age-discrimination issue later raised in the present action, this action is not barred by reason of the collateral attack doctrine. Our conclusion that the district court has jurisdiction to consider the ADEA claims is not inconsistent with the principal authorities relied on by Judge Ward. For reasons already noted, *City of Tacoma*, *supra*, and *Lambert Run Coal Co.*, *supra*, are clearly distinguishable. No ADEA, Title VII or similar claims were asserted in *Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973), and *Oling* v. *Air Line Pilots Ass'n*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965). Those two decisions did not rule upon the substantive fairness of integrated seniority lists but on whether the unions had breached their duty of fair representation before the CAB, an issue over which the CAB has jurisdiction because it bears directly on whether the lists were arrived at in a fair and equitable "manner" as provided for by LPP § 3. But even if the CAB's authority were enlarged to permit it to rule on the substantive fairness of the integrated seniority lists, we believe, for the reasons already stated, that plaintiffs would not be precluded from obtaining a *de novo* federal court review of that issue. *Gardner-Denver*, *supra*; *McDonald*, *supra*.

We find ourselves unable, for the reasons already indicated, to follow the District of Columbia Circuit's decision in *Carey* v. *O'Donnell*, 506 F.2d 107 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975), upon which Judge Ward relied. The court there held that the district court lacked jurisdiction over plaintiffs' claim that the defendants had violated the ADEA, in view of the court's approval on the same day, in *Northeast Master Executive Council* v. *C.A.B.*, 506 F.2d 97, *cert. denied*, 419 U.S. 1110 (1975), of the Board's dismissal of petitions alleging that the underlying integration of seniority lists had not

been arrived at in a "fair and equitable manner." The D.C. Circuit purported to rely on the rationales expressed in *Kesinger, supra,* and *Oling, supra,* which are clearly distinguishable for the reasons we have noted above. Moreover, it did not analyze the claims before the district court, the limited authority of the CAB, and the right to a *de novo* trial of ADEA claims, but merely stated in conclusory fashion that the action amounted to a collateral attack on the seniority lists approved by the Board.

Our holding that federal jurisdiction exists over plaintiffs' ADEA claims is not intended to imply that the claims have merit or that plaintiffs will have the right to reopen the integrated seniority lists formulated by the parties' mutually selected arbitrator. Although the complaint's allegations of "willful and continuous violation of Section 4(a) of the ADEA" (Compl. ¶¶ 14, 16) at first blush appear to sound in terms of discriminatory intent with respect to each of the plaintiffs, this case is governed by § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2). That section insulates an employer or labor organization from ADEA liability for observing the terms of a "bona fide seniority system . . . which is not a subterfuge to evade the purposes" of the ADEA.

The criterion for determining whether a seniority system is a "bona fide" one is stated in the pertinent regulation issued under the Act, 29 C.F.R. § 1625.9(a) (1984), which provides that "[t]hough a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion . . .". Since the merged list uses length of service at the top and bottom ends of the list and uses length of service combined with a ratio between the two former lists for the middle of the merged list, it would appear to satisfy the test that length of service be the "primary criterion."

With respect to the requirement that a seniority system not be a "subterfuge," a term that implies discriminatory or evasive intent, as in § 703(h) of the Civil Rights Act, 42 U.S.C. § 2000(e)-2(h), *see American Tobacco* v. *Patterson*, 456 U.S. 63, 64-65 (1982), the same regulation states that "a purported seniority system which gives those with longer service lesser rights . . . may, depending on the circumstances, be a 'subterfuge to evade the purposes' of the Act." *Id.* at § 1625.8(b). Among the circumstances to be considered in this case are the validity of the reasons advanced by the unions for the use of a ratio method in the middle of the list, as well as the validity of plaintiffs' claim that defendants have engaged in "willful" discrimination.

The mere fact that plaintiffs would have fared better under a different scheme does not show that the merged seniority list is a "subterfuge" to evade the ADEA, especially in view of the distinction that must be drawn between age and seniority, in the absence of any evidence in the present record that the union representatives acted in bad faith or with an age-discriminatory motive in arriving at a compromise, or that Pan Am so acted in accepting and implementing it. That compromise recognized that a straight "time served" method would discriminate unfairly in favor of a large number of furloughed Pan Am pilots against actively employed National pilots bringing jobs with them to the merger, and it therefore adopted a ratio method for the middle portion of the integrated seniority list. As the CAB observed:

> "Arbitrator Gill was faced with totally opposed positions for the integration of the seniority lists, and the parties were fully permitted to develop their cases supporting their separate positions in a record involving over 4,700 transcript pages and hundreds

of exhibits. In the end the arbitrator did what most arbitrators do—he picked parts of the different positions and made compromises to arrive at what he believed was an equitable result. There is no way, given the sharply divergent and contested positions of the parties, that the arbitrator could ever reach a result that was fully acceptable to all parties—to say nothing of the individual pilots and flight engineers whose interests were represented in the proceeding. That is an inevitable result of arbitration. The fact that dissatisfaction remains is no basis for requiring another seniority integration." CAB Order 82-4-75, at 13.

Plaintiffs' claim that the defendant unions violated their duty of fair representation in the CAB proceeding stands on an entirely different footing from plaintiffs' ADEA claim. To make out this claim plaintiffs must prove that the "union's conduct toward a member of the collective bargaining unit [was] arbitrary, discriminatory, or in bad faith." *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967). Subsequent interpretations have established that proof of mere negligence or errors of judgment on the part of the union is insufficient.

> "To succeed [in a suit for violation of the duty of fair representation] under § 301 [of the Labor Management Relations Act, 29 U.S.C. § 185], an employee must show 'substantial evidence of fraud, deceitful action or dishonest conduct,' . . . 'hostile discrimination,' . . . arbitrariness or irrationality, . . . , or conduct in bad faith. . . .
>
> "As long as the union acts in good faith, courts cannot intercede on behalf of employees who may be prejudiced by rationally founded decisions which operate to their particular advantage." (Citations

omitted). *Capobianco* v. *Brink's Inc.*, 543 F. Supp. 971, 975 (E.D.N.Y. 1982), *aff'd mem.*, 722 F.2d 727 (2d Cir. 1983).

The CAB's statutory authority under 49 U.S.C. § 1486(a), as amplified by § 3 of the LPPs, requires it, in order to rule upon whether seniority lists have been integrated in a "fair and equitable manner," to determine whether the unions involved have fairly represented their members in the negotiations and ensuing arbitration proceedings. Moreover, the CAB did just that in the present case. The Board found, as had Arbitrator Gill, that the interests of all the employee groups had been vigorously represented throughout the proceedings and that neither the Janus Group nor PAPF had shown a violation of the unions' duty of fair representation:

> "Neither group, both formed to forward the views of some Pan Am furloughees and pilots, respectively, who were otherwise represented in the intra-union arbitration by Pan Am Engineers and Pan Am pilots, has shown that these union representatives breached their duty of fair representation. The record before us amply demonstrates that all union parties vigorously advocated positions on seniority integration advantageous to their members. Janus Group, in addition, appeared in the arbitration to express, directly to Arbitrator Gill, its position for furloughees. To the extent that some of the parties failed to prevail in the substance of their views, and hence occasioned disappointment for certain furloughees and pilots, that is not grounds for our review of the intrinsic nature of the integration system established by the award. It is well-settled that the Board properly 'decline[s] to review and to enter judgment on the merits of * * * [union representatives'] negotiated

> resolution of * * * [an internal union] seniority dispute arising out of a merger' if satisfied 'that the resolution was reached in a fair and equitable manner.' Here, the record shows that the labor parties adopted fair and equitable procedures—four-way negotiation, mediation, and final and binding arbitration—to resolve their differences on merged seniority; and that the procedures were faithfully carried out—even to the unanimous selection of an eminent arbitrator in airline seniority matters." CAB Order 82-4-75, at 11 (footnote omitted).

Since the CAB is empowered to and did resolve the fair representation claim, and since plaintiffs are not entitled to *de novo* adjudication by a district court of that claim, the district court's dismissal of the claim as an impermissible collateral attack on the CAB's final order is affirmed.

Appellees next contend that the district court's dismissal of the action should be affirmed on the ground that appellants' ADEA claim is time-barred for failure to file charges with the EEOC within the required 300 days after "the alleged unlawful employment practice occurred". 29 U.S.C. § 626(d)(2). This requires us to "identify precisely the 'unlawful employment practice' of which [the plaintiff] complains." *Delaware State College* v. *Ricks*, 449 U.S. 250, 257 (1980). Appellees argue that the unlawful practice here occurred in September 1981 when the Gill arbitration award was filed and published by Pan Am, more than 300 days before plaintiffs' filing of their ADEA charges with EEOC. Plaintiffs, on the other hand, contend that the crucial event for ADEA time-bar purposes did not occur until March 28, 1983, when Pan Am first implemented the alleged discriminatory seniority lists by making assignments in accordance

with them, as alleged in Par. 12 of their complaint, and that their claim did not accrue until that time, which was within 300 days prior to the filing of their ADEA charges with the EEOC. Moreover, plaintiffs argue, even assuming their claim first accrued in 1981, the violation was a continuing one, thereby making timely their filing of EEOC charges, and the implementation of the seniority system was not a mere consequence or manifestation of the earlier conduct. *See Chardon* v. *Fernandez*, 454 U.S. 6, 8 (1981).

We have recently held that "[w]hen employees are hired or refused employment pursuant to a continuous practice and policy of discrimination, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it, *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256, 274 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982), provided such a continuing violation is clearly asserted both in the EEOC filing and in the complaint."[3] *Miller* v. *I.T.&T.*, 755 F.2d 20, 25 (2d Cir. 1985). In *Moreland* v. *NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979), for instance, the court held that "adoption of a seniority system, if discriminatory as to age, constitutes a continuing violation of the ADEA as long as that system is maintained by the employer." *See also E.E.O.C.* v. *Home Ins. Co.*, 553 F. Supp. 704 (S.D.N.Y. 1982); *but cf. Bronze Shields, Inc.* v. *N.J. Dept. of Civil Service*, 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982). Applying these principles here, we hold that the alleged discriminatory violations in the present case must

[3] At the request of the court, plaintiffs have submitted copies of charges filed with the EEOC in which plaintiffs clearly assert ongoing violations of the ADEA. The complaint also alleges ongoing violations. *See* ¶¶ 14-18.

be classified as continuous ones, giving rise to claims accruing in favor of each plaintiff on each occasion when the merged seniority list was applied to him, provided he filed such charges with the EEOC, which he would be required to establish on remand, *Miller* v. *I.T.T.*, *supra*, 755 F.2d at 25.

Appellants' final contention, that appellees should be estopped from asserting the ADEA time-bar defense, needs little discussion. In *Price* v. *Litton Business Systems, Inc.*, 694 F.2d 963, 965 (4th Cir. 1982), the court refused to find estoppel in the absence of a finding that the failure to make a timely filing was in consequence "either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge." *Accord Kriegsmann* v. *Barry-Wehmiller Co.*, 739 F.2d 357, 359 (8th Cir.), *cert. denied*, 105 S.Ct. 512 (1984). *See also Pfister* v. *Allied Corp.*, 539 F. Supp. 224, 227 (S.D.N.Y. 1982) (no estoppel where "no allegation that the defendant acted in bad faith or deceitfully lured the plaintiff into settlement discussions, or that it attempted in any way to cause the plaintiff to miss the appropriate filing date").

Appellants here have not satisfied their burden on this issue. They make no estoppel argument against Pan Am. Against the defendant unions, they fail to allege detrimental reliance on any union representations. Nor could they do so, in view of Pan Am's posting of the seniority lists in March 1981 and the retention by PAPF in May 1981 of the same law firm that currently represents plaintiffs.

The order of the district court is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

APPENDIX A

PLAINTIFFS WHO FILED CHARGES WITH E.E.O.C. OR STATE AGENCY

NAME	ADDRESS	CITY	ST	ZIP
AINSWORTH JR	9365 S. Spencer	Las Vegas	NV	89123
ALEXANDER DB	18 Birchwood Lane	Ramsey	NJ	07446
BANDY JM	7 Merwin Bk. Rd.	Brookfield Ctr.	CT	06805
BARNES KE	2244 Nightingale Dr.	Santa Rosa	CA	95401
BENTON, JE	Rt. 9, Box 275	Goldsboro	NC	27530
BERGAD JR	P.O. Box [illegible]5	Torrington	CT	06790
BILLINGS MX	641 S. Rivershire Dr.	Conroe	TX	77304
BLEDSOE RP	P.O. Box 427	Cockeysville	MD	21030
BOLING JR	52 Squires Rd.	Madison	CT	06443
BOWLES ME	Rte. 6, Box 168A	Charlottesville	VA	22901
BROWN JM	204 E. Deer Park Dr.	Gaithersburg	MD	20877
BURMASTER RA	Rte. 1, Box 349 E	Leesburg	VA	22075
CAMPBELL JD	3718 Divisadero St.	San Francisco	CA	94123
CARDINAL DP	552 Pinelawn Ave.	Belleair	FL	33516
CLARKE FR	19 Viejo Way	Novato	CA	94947
COOK JC	76 Davenport Dr.	Stamford	CT	06902
COOL CE	Box 151	Henderson Harbor	NY	13651
CORY DC	RD 2	Frenchtown	NJ	08825
DAHONEY TG	129 Clapp Road	Scituate	MA	02066
DAVIS MK	4908 Overview Dr. Apt. 1212	Arlington	TX	76017
DELAVAN WP	67 Highpoint Dr.	Gulf Breeze	FL	32561
DONNELLY WJ	15601 SW 83rd Ave.	Miami	FL	33157
DURANT RJ	106 Hessian Hill Dr.	Pennington	NJ	08534
EAGER CE	103 Lincklaen St.	Cazenovia	NY	13035
ECKEL R	P.O. Box 30664 JFK Airport	Jamaica	NY	11430
ENDRESEN DA	Box 45 Botsford Hill Rd.	Roxbury	CT	06783
FINLEY CB	P.O. Box 7671	Woodlands	TX	77387
FRAGA RM	1540 Mancha Dr.	Boulder City	NV	89005
FRANK RK	Box 615	Shelter Island	NY	11964
FREEMAN CE	7747 Carrleigh Pkwy.	Springfield	VA	22152
GAUTHIER RW	3322 Cowper St.	Palo Alto	CA	94306
GRAY JE	RFD 1, Box 186	Bethlehem	CT	06751
GREEN JG	498 Scotts Lndg. Rd.	Southampton	NY	11968
GRISEL GR	7475 Estrella Cir.	Boca Raton	FL	33433
HALL RH	P.O. Box KK	Wellfleet	MA	02667
HAMMES PL	24 Governors Lane	Bethel	CT	06801
HANDLEY FK	2519 Manhattan Ave.	Manhattan Beach	CA	90266
HANSEL KA	P.O. Box 4021	Burlingame	CA	94011
HARGIS RO	225 Montalvo Rd.	Redwood City	CA	94062

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NAME	ADDRESS	CITY	ST	ZIP
HERNDON WK	42 Crest Dr.	Little Silver	NJ	07739
HOWE JG	P.O. Box 101	Greendell	NJ	07839
HUBBARD DG	5926 S. 73rd E Ave.	Tulsa	OK	74145
JARBOE RL	318 Lake June Dr.	Lake Placid	FL	33852
KAWAMOTO DK	6850 Glenview Dr.	San Jose	CA	95120
KELLEY RC	483 NW 105th Dr.	Coral Springs	FL	33065
KIRKMAN JD	2303 E. 2nd St. #3	Bloomington	IN	47401
KLAU DA	15 Pond Side Lane	West Simsbury	CT	06092
KORCHECK SM	1480 Coronet Dr.	Reno	NV	89509
LEE WR	2106 Oriole CT	Fairfield	CA	94533
LOCHER AH	151 Clapboard Ridge	Danbury	CT	06810
LUDWIN RJ	RR 1 North Rd.	New Milford	CT	06776
LYNCH EJ	3002 Yorkshire Rd.	Doylestown	PA	18901
MALO ME	11500 Fairway Dr. #507	Reston	VA	22090
MANIOUDAKIS EX	RD 3 Box 372	Somerset	NJ	08873
MARKHAM DA	7411 N.W. 8th Court	Plantation	FL	33317
MATEI MM	1913 Kenilworth Ct.	Toms River	NJ	08753
MAYO DQ	Rte. 2 Box 85, Sunset Dr.	Ottsville	PA	18942
MCAULEY GH	928 Peninsula Ave #409	San Mateo	CA	94401
MCGRORY RC	501 East Mill Road	Flourtown	PA	19031
MCVAY PR	Route 1 Box 63	Roxbury	CT	06783
MEIXSELL CF	202 Summer Ave.	Horsham	PA	19044
MILLER JW	15 Greta Dr.	Danbury	CT	06810
MOON EE	745 Windward Rd.	Jackson	MS	39206
MURPHY BP	5900 Sarah Ct.	Austin	TX	78731
NORDMAN VJ	5109 Green Acres Ct.	Metairie	LA	70003
O'BRIEN WJ	73 Princess Anne Ct	Warrenton	VA	22186
O'NEILL RF	474 Pepperwood Ct.	Marco Island	FL	33937
OBER RI	3 Thornwood Ct.	Setauket	NY	11733
OLESEK FW	9421 SW 147th St.	Miami	FL	33176
PARRISH BP	2970 Avalon Ave.	Berkeley	CA	94705
PAUL RV	8800 SW 123d Ct., J-203	Miami	FL	33186
PERRY RA	1152 St. John Place	Santa Ana	CA	92705
PICKEN WR	48 Big Oak Lane	Stamford	CT	06903
PLATTE CR	83 Kellogg Dr.	Wilton	CT	06897
POST RR	Route 1 Box 357	Newport	WA	99156
RAHISER WS	P.O. Box 306	Branford	CT	06405
RENNINGS AA	Box 124 RD #2, Jonestown Rd.	Oxford	NJ	07863
SALKOVICS AJ	3144 Goldenspur	Camarillo	CA	93010
SCHWAB EA	2615 Majestic Dr.	Wilmington	DE	19810
SHEPARD HE	38 Jenkins Rd.	Franklin	NJ	07416
SLOAN GC	521 Altivo Ave.	Watsonville	CA	95076
STANNARD LA	129 Newton Ave.	Norwalk	CT	06851
TAUBERT AR	Rte. 3, Foxrun Lane S	Newtown	CT	06470

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NAME	ADDRESS	CITY	ST	ZIP
UGIANSKIS RX	PO Box 16, Candlewood Isle	New Fairfield	CT	06812
VAN WYK PD	68 New Garden Ave.	Lancaster	PA	17603
WARREN VF	P.O. Box 579	Carnelian Bay	CA	95711
WEAVER RH	1533 Sopera Ave.	Coral Gables	FL	33134
WENK PJ	52 Wellsweet Dr.	Madison	CT	06443
WILDER JB	251 Hickory Lane	Roxbury	CT	06783
WILLEUMIER RC	618 Hill Street	Barrington	IL	60010
WIRKKI TK	Box 423	Salem	NY	12865
WYSARD JF	RR 2, Box 91, West Lake Rd.	Mayville	NY	14757
ACKROYD KG	5331 Castle Hills Dr.	San Diego	CA	92109
BLAYDON CJ	245 West Maple Ave.	Langhorne	PA	19047
DATER MR	RD Box 5	Salisbury	CT	06409
DUNPHY WW	4 Limekiln Rd	Ridgefield	CT	06877
ENGLISH RB	103 Main St.	Centerbrook	CT	06409
GASKILL JP	1335 Wood Park Dr.	Kennesaw	GA	30144
GERT WA	8815 NE 28th St.	Bellevue	WA	98004
HAKIM PR	1881 Cragin Dr.	Bloomfield Hills	MI	48013
HOLLAND DK	107 Pt O'Woods Dr.	Toms River	NJ	08753
KURTZ D	Paradise Valley Rd. RFD #1 Box 310-W	Bethlehem	CT	06751
MOREY RL	295 Morningsun Ave.	Mill Valley	CA	94741
NEUMEISTER JT	9 Baldwin Dr.	Sussex	NJ	07461
RHODES EA	3343 N.E. 116th St.	N. Miami Beach	FL	33160
STEFFAN KJ	253 Farview Ave.	Long Valley	NJ	07853
TURNER EB	20 Mt. Foraker Ct.	San Rafel	CA	94903
WAGER R	Skyline Ranch Box 8	Jackson	WY	83001
WEAVER LG	Elvirasteig 43	1 Berlin 37		

APPENDIX B

PLAINTIFFS WHO ARE OPTING INTO THIS ACTION

NAME	ADDRESS	CITY	ST	ZIP
ABRAHAM JW	12831 Viscaino Rd.	Los Altos Hills	CA	94022
ADAMS FE	8 Autumn Ridge Rd.	Weston	CT	06883
ADAMS RJ	217 Woodland Dr.	Osprey	FL	33559
ALFORD TL	83 Robin Ridge Dr.	Madison	CT	06443
AMOS JI	2703 St. James Rd.	Belmont	CA	94002
ANDING JD	River Rd.	Wash Crossing	PA	18977
ANTILL WZ	3459 NE 30th Ave.	Lighthouse Pt	FL	33064
ARCHER EL	506 S. Union Ave.	Fergus Falls	MN	56537
ARCHER SH	7340 SW 132nd St.	Miami	FL	33156

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NAME	ADDRESS	CITY	ST	ZIP
ARFSTEN KE	616 Rinaldo St.	Santa Rosa	CA	95405
AVINELIS FE	825 Wootten Dr.	Kerman	CA	93630
BAKER FA	17 Betsy Lane	Ambler	PA	19002
BALDINGER JE	P.O. Box 662	Pullman	WV	26421
BARKER HM	155 N. Harbor Dr. #1712	Chicago	IL	60601
BARNETTE JL	140 NE 53 Ct.	Ocala	FL	32671
BEENE JT	4028 Lynbrook Lane	Arlington	TX	76015
BEHRE RE	101 Sagamore Dr.	Murray Hill	NJ	07974
BERDEAUX BJ	P.O. Box 66-1335	Miami Springs	FL	33266
BERGER RL	3100 NE 49th St. #1102	Ft. Lauderdale	FL	33308
BETHEA WD	2716 Creekbed Lane	Charlotte	NC	28210
BLACK LD	RD 8 Box 236	Flemington	NJ	08822
BLUM JE	137 Elm St.	San Mateo	CA	94401
BRAISTED SC	5961 SW 17th St.	Plantation	FL	33317
BREEN CA	149 Northbridge Ave.	Warwick	RI	02886
BRICKEY RE	2314 South 22nd E.	Salt Lake City	UT	84109
BROWNING DG	740 Penfield St.	Longboat Key	FL	33548
BUTLER DE	Wolzogenstr 17	1 Berlin 27		
BUTLER RE	3840 Wood Ave.	Coconut Grove	FL	33133
BUTTERILL JB	4101 NE 16th Ave.	Ft. Lauderdale	FL	33334
CALVERT JD	10362 Center Dr.	Villa Park	CA	92667
CANEDY DJ	4666 Vernette Dr.	El Cajon	CA	92020
CANTARANO TF	3530 W. 187th St.	Torrance	CA	90504
CARROLL PL	967 W Rambling Dr.	W. Palm Beach	FL	33411
CASEY TB	18 Ellsworth Park	Cambridge	MA	02139
CASSOTIS JN	9 Forest St.	Londonderry	NH	03053
CAVALLARO CF	Box 704	Sharon	CT	06069
CHAMBERLAIN KS	6677 Villa Bonita Rd.	Las Vegas	NV	89102
CLACK RH	RR Box 380	Hamburg	NJ	07419
COHEN SX	Bozener Str 11	1000 Berlin 62		
COLES AE	RD 1 Box 505-B	Stockton	NJ	08559
COMPTON HG	1 Cove Rd.	Brookfield	CT	06804
COOKE WM	407 Sylvia Way	San Rafael	CA	94903
COOPER DE	240 NW Ferry St.	Poulsbo	WA	98370
COOPER JD	RD #1 Box 93	Columbus	NJ	08022
COSHLAND GC	2282 Dosinia Ct.	Reston	VA	22091
CRISTMAN VD	76 Locker St., P.O. Box 151	Beachwood	NJ	08722
CROWL DL	9 Hemlock Dr.	Deep River	CT	06417
CUNNINGHAM JJ	615 Millcross Rd.	Lancaster	PA	17601
CUTCHIN AA	RFD 2 Box 149	Onancock	VA	23417
DAVIS CR	P.O. Box 3339	San Clemente	CA	92672
DICKINSON DC	1212 Winter Spring B	Winter Springs	FL	32708
DIETER CJ	258 East Wood Rd.	Roxbury	CT	06783
DORSEY RM	Roxbury Station	Roxbury	CT	06783

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NAME	ADDRESS	CITY	ST	ZIP
DRENNAN DC	219 Paseo Del Rio	Moraga	CA	94556
DREW HE	16200 Mt. Rose Highway	Reno	NV	89511
DUNKLEE JC	P.O. Box 4166	Incline Village	NV	89450
DWYER DJ	5 Summit St.	Rensselaer	NY	12144
EUBBS SK	20 Mtn. Laurel Lane	Fletcher	NC	28732
EDGERLY DF	57 Rita Dr.	New Fairfield	CT	06810
EGERER RA	1480 Bradley Rd.	Bow	WA	98232
ELLISON GL	20775 Salida Terr.	Boca Raton	FL	33433
FAGERLAND DD	6000 93rd Ave. SE	Mercer Island	WA	98040
FALZARANO VL	7900 SW 146th St.	Miami	FL	33158
FARRINGTON TD	4260 Pines Rd.	Paducah	KY	42001
FELL DM	P.O. Box 615	Homer	AK	99603
FERNANDES DR	R.D. 6, Box 342	Flemington	NJ	08822
FIGUEROA FH	9280 Font'bleau Blvd.	Miami	FL	33172
FINDLAY DJ	P.O. Box 310	Gig Harbor	WA	98335
FLATTER DE	2630 NE 51st St.	Lighthouse Pt.	FL	33064
FLEISCHER RH	349 Vista Linda Dr.	Mill Valley	CA	94941
FLYNTZ J	63 Summit Rd.	Sparta	NJ	07871
FOURNET DJ	154 Gerald Dr.	Danville	CA	94526
FOXWORTH TG	5449 Rutherford Dr.	Woodbridge	VA	22193
FRIEND PE	2404 Lakefrt Dr.	Knoxville	TN	37922
FROST S	2760 NE 23rd Place	Pompano Beach	FL	33062
FUSTER AS	8125 Westbourne Dr.	Pensacola	FL	32506
GAGE LC	2255 Sunrise	Reno	NV	89509
GALLI RP	11 Gill St.	Exeter	NH	03833
GEORGE RL	6605 Tina Lane	McLean	VA	22101
GICK RP	2363 Greenswaro S.	Warrington	PA	18976
GIDDENS DR	390 Everett Place	Danville	CA	94526
GIROUARD NG	1701 NE 64th St.	Ft. Lauderdale	FL	33334
GOLIBER JT	25 Pine Hill Bend	Ballston Lake	NY	12019
GOOLSBY TE	RD 1 Sunset Lane	Washington Depo	CT	60794
GORMAN LR	P.O. Box 20862	Billings	MT	59104
GREINER RM	465 Harwood Ave.	Satellite Bch.	FL	32937
GUETTLER DP	Gustav Freytag 15	1 Berlin 33		
HAMAN DB	PO Box 131, Candlewood Isle	New Fairfield	CT	06812
HARLAN RR	5850 Cameron Run Ter.	Alexandria	VA	22303
HATCH TE	9 Appletree Way	Long Valley	NJ	07853
HEATHCOCK AD	524 Fawns Walk	Annapolis	MD	21401
HEEMSTRA JW	Winston Dr.	Washington Depo	CT	06794
HEINRICH RW	P.O. Box 1575	Allentown	PA	18105
HEWLETT BN	Bogus Hill #248	New Fairfield	CT	06812
HICKS LM	169 Rutledge Ct.	Conroe	TX	77302
HOFF TL	1503 Quaker Ridge	Austin	TX	78746
HOFFMAN DJ	1800 S.W. 75th Terr.	Plantation	FL	33317
HOFFMAN R	17 Skylark Rd.	Bloomingburg	NY	12721

APPENDIX B

NAME	ADDRESS	CITY	ST	ZIP
HORROCKS AG	56 Old Bridge Rd.	Brookfield	CT	06804
HUBER DE	420 NE 9th Ave.	Ft. Lauderdale	FL	33301
HUDSPETH CB	1099 Tilton Rd.	Sebastopol	CA	95472
HUESMAN MJ	73 Shore Land Dr.	Key Largo	FL	33037
HUNSBERGER LM	7194 Hillcrest Dr.	Macungie	PA	18062
HURD TL	P.O. Box 1384	Park City	UT	84060
HUSKEY BP	Rt. 7 Box 163, South Rugby Rd.	Hendersonville	NC	28739
ISRAELITE DZ	116 Central Park So.	New York	NY	10019
JOHNSTON IR	2361 Morrison Lane	Suisun	CA	94585
JONES JH	741 Marshall St.	Beverly	NJ	08010
JORGENSEN CW	47 Mohawk Ave.	Corte Madera	CA	94925
JUNG DH	Clayallee 44	1000 Berlin 33		
KANE TJ	1228 S. Inverness Way	Fresno	CA	93727
KANODE JS	Wingfield Res. Est., 1763 Cocoplum Ct.	Longwood	FL	32779
KASPAR MA	Box 321	Lumberton	NJ	08048
KAST R	41 White Pine Dr.	Brookfield Ctr.	CT	06805
KAY RE	RD 2 Box 162E	New Hope	PA	18938
KELLY PL	P.O. Box 331S Rd., Rhododendron Rd.	Fitzwilliam	NH	03447
KELLY WH	85 Viscount Dr., A-62	Milford	CT	06480
KIEHLE GA	1486 Country Club Dr.	Los Altos	CA	94022
KILLER RE	3309 Melendy Dr.	San Carlos	CA	94070
KILLMON BC	RT 1 Box 756	Moore Haven	FL	33471
KLINE WJ	P.O. Box 66	Elkton	FL	32033
KNOWLES HW	1697 N. Goldeneye Ln.	Homestead	FL	33030
KNUDSON RC	2200 Panorama Way	Salt Lake City	UT	84124
LAMAR JW	7007 Erland Rd.	Santa Rosa	CA	95405
LAMBERT TD	Laurel Lane	New Castle	NH	03854
LARSON LT	5213 NW 58th Court	Gainsville	FL	32606
LASH JF	578 Caber Drive	Santa Rosa	CA	95405
LAUMEYER RH	Box 548	Teton Village	WY	83025
LEET AC	4493 Faraone Court	San Jose	CA	95136
LEGARE MT	3761 NW 100th Ave.	Coral Springs	FL	33065
LESTER GT	2171 30th Ave.	San Francisco	CA	94116
LEWIS EW	Box 2102	Castro Valley	CA	94546
LIGHT HA	2870 NW 107 Ave.	Coral Springs	FL	33065
LIVINGSTON DB	19 Stoney Brook Rd.	Holmdel	NJ	07733
LONGLEY JD	240 Shore Drive, P.O. Box 567	Ozona	FL	33560
LOWRY JR	4 Miller Place Rd.	Miller Place	NY	11764
MACGLASHAN DH	78 Nut Plains Rd.	Guilford	CT	06437
MAGUIRE JM	Harborview Dr., Box 321	Essex	CT	06426
MANCHESTER SA	99 Broadmoor Ct.	Novato	CA	94947
MANN KA	981 Bluebird St.	Naples	FL	33942

APPENDIX B

NAME	ADDRESS	CITY	ST	ZIP
MARINO JM	25 Spring Garden Ave.	Colts Neck	NJ	07722
MASON T	350 Orion Court	Merritt Island	FL	32953
MAYER RL	220 Ersilia Trail	Alamo	CA	94507
MCALINDEN GI	3 Elm S., PO Box 194	Hopewell	NJ	08525
MCCONNELL RH	1330 Concord St.	Los Altos	CA	94022
MCEWAN JL	Rose Farm Center Rd.	Lyndeboro	NH	03082
MCKAY EA	19 Elizabeth's Way	Chatham	MA	02633
MCLAY D	920 Lake Forest Rd.	Clearwater	FL	33575
MCLEAN BE	1116 SW 4th Court	Gresham	OR	97030
MICHEL FL	3215 Norman Dr.	Reno	NV	89509
MILLER C	235 Linden Dr.	Boulder	CO	80302
MILLER KG	764 Berkshire Dr.	Millbrae	CA	94030
MONACO DR	P.O. Box 1768	Orinda	CA	94563
MONTGOMERY DC	2012 Leisure Dr. NW	Winter Haven	FL	33881
MOONEY WJ	10900 SW 112th Ave.	Miami	FL	33176
MORRIS GS	2115 Skyline Blvd.	Reno	NV	89509
MORRISON HA	18 Plaisted St.	Bangor	ME	04401
NEEDHAM FS	1777 Coralway North	Vero Beach	FL	32963
NELSON LM	6999 Estes Dr.	Arvada	CO	80004
NESSA NA	Box 78	Solebury	PA	18963
NEWBERRY JI		Powersville	GA	31074
NEWMAN GM	5530 Ambrose Drive	Reno	NV	89509
NOLAN CC	4189 Dimholt Court	Winston Salem	NC	27104
NOTINE DM	503 Bay 5th St.	West Islip	NY	11795
ODOM HB	220 Jagoe St.	Denton	TX	76201
OLASZ E	P.O. Box 1005	Sanibel	FL	33957
OMURA LH	First Street	Connelly	NY	12417
ORR CW	13 E. Townhouse Lane	Grand Praire	TX	75051
OTT DE	P.O. Box 5182	Incline Village	NV	89450
OUELLETTE CA	556 So. Ely Blvd.	Petaluma	CA	94952
PAPA HW	3806 Ashley Dr. S.	Mobile	AL	36608
PARKER RC	323 Beach Rd. North	Wilmington	NC	28405
PARKER WS	245 E. 54 St., #15J	New York	NY	10022
PATE DC	Kniephof Str. 26A	1 Berlin 41		
PENN RA	4063 N. Canyon Rd.	Camino	CA	95709
PESZYNSKI PR	1105 Via Media	Lafayette	CA	94549
PIAVIS WW	4460 Lambert Dr.	Kennesaw	GA	30144
PINGREY RH	114 Sandalwood Ct.	Santa Rosa	CA	95401
PLASKON WG	P.O. Box 1143	Mill Valley	CA	94942
PLATTS RP	2024 Quincy Ct.	Salina	KS	67401
POIRIER EJ	209 Patricia Ave.	Delran	NJ	08075
POPE TW	3522 Central Ave.	Nashville	TN	37205
POUY FR	36 Flying Cloud Rd.	Stamford	CT	06902
PROFT CJ	4842 Fremont Ave. S.	Minneapolis	MN	55409
QUIMBY CF	2829 Ellis St.	Bellingham	WA	98225
RAGLAND JD	980 SW 74th Terrace	Plantation	FL	33317

APPENDIX B

NAME	ADDRESS	CITY	ST	ZIP
REDMAN FW	RR #1 Box 432	Bethel	CT	06801
REMPE WH	Lake Road	Newtown	CT	06470
ROBBINS RD	13 Winterberry Dr.	Amherst	NH	03031
ROGERS GA	128 Byram Shore Rd.	Greenwich	CT	06830
ROSS RM	2335 Odyssey Way	Toms River	NJ	08753
RUPP RN	6 Summit Ct.	Woodbury	CT	06798
SABELLA RR	2720 NE 42nd St.	Lighthouse Pt.	FL	33064
SALISBURY WT	535 Fielder's Lane	Toms River	NJ	08753
SAVAGE KD	640 Ridgewood Rd.	Key Biscayne	FL	33149
SCHAKE WE	4039 White Oak Ct.	Sonoma	CA	95476
SHAVER JK	48 Cottontail Rd.	Norwalk	CT	06854
SHEASLEY GF	16919 N.E. Clackamas	Portland	OR	97230
SHELFKO KA	Rt. 3, Box 630 B1	Spokane	WA	99203
SHUMAN JH	7901 SW 154 Terrace	Miami	FL	33157
SHUSTER JF	RD #1 Achortown Rd.	Beaver Falls	PA	15010
SLIFKA RL	4359 Mt Helix, Highlands Dr.	La Mesa	CA	92041
SMITH CD	9903 NW 19th St.	Coral Springs	FL	33065
SMITH WT	237 Redwood Lane	Cheshire	CT	06410
SMITHSON RB	2253 Gilman Dr. W. #501	Seattle	WA	98119
SONOMURA A	5152 Maple	Irvine	CA	92714
SPANGENBURG RB	9106 Lyon Park Ct.	Burke	VA	22015
SPILLANE WD	1020 Aoloa Pl. #208A	Kailua	HI	96734
STAUFFER DL	P.O. Box 2627	Truckee	CA	95734
STEGMANN EP	1223 Eddie Dr.	Port Orange	FL	32019
STEPHENSON JE	Janick Strasse 75	1 Berlin 37		
STOECKER GG	P.O. Box 33-1150	Coconut Grove	FL	33133
THIELE GF	2 Pine Tree Hill Rd.	Newton	CT	06470
THOMAS JR	RR #2 Box 952A, Hwy. 24	Chester	NJ	07930
THOMAS WM	1018 Great Oaks Dr.	Hopkinsville	KY	42240
THOMPSON JM	26505 Dutcher Creek	Cloverdale	CA	95425
THORUP JS	1845 N. Santa Rita	Tucson	AZ	85719
TINGLE TH	P.O. Box 3085	Incline Valley	NV	89450
TOOKE HW	408 Timber Lane	Newton Square	PA	19073
VAN NOTE TE	3 Brookview CT	Ho-Ho-Kus	NJ	07423
VOTRUBA WK	251 Crandon Blvd., #129	Key Biscayne	FL	33149
WACHTEL MR	24 Hastings Dr.	Northport	NY	11768
WAGNER DC	53 Main St.	Ridgefield	CT	06877
WAGNER RK	Rt. 2 Box 144A-5	Umatilla	FL	32784
WAGNER RR	165 Penn Harb Rd.	Pennington	NJ	08534
WALCHLI DC	2524 Laguna Vista Dr.	Novato	CA	94947
WALTERS AE	P.O. Box 37	Pleasant Mount	PA	18453
WARD TB	528 Parker Ave. SE	Decatur	GA	30032
WEBB RB	6420 Boca del Mar Dr. #406	Boca Raton	FL	33433
WEBER HL	82 Eleven Levels Rd.	Ridgefield	CT	06877

APPENDIX B

NAME	ADDRESS	CITY	ST	ZIP
WIK DC	2610 Patio Simpatico	Lake Havasu Cy	AZ	86403
WILLETT WA	Rt. 1, Box 263	Dundee	OR	97115
WILLIAMSON KA	9 Swan Lane	Hauppauge	NY	11788
WILTJER JR	623 South Pitt St.	Alexandria	VA	22314
WOOD CL	1809 Edenwald Lane	Lancaster	PA	17601
WOOLDRIDGE DW	Rt. 3, Box 81	Muskogee	OK	74401
WOOLSEY SD	14 Creekwood Ct.	Danville	CA	94526
WREN RP	RFD 1, Box 516C	Heber City	UT	84032
YELTON RW	680 Miller Dr. 205W	Miami Springs	FL	33166
YOUNG GF	P.O. Box 76	Stanfordville	NY	12581
ZIPRIS M	7411 S.W. 9th St.	Plantation	FL	33317
TAYLOR GG	10840 Nollwood Dr.	Chardon	OH	44024
THOMAS HS	Unter Den Eichen 114	1000 Berlin 45		
THOMPSON JP	22763 A Voss Ave.	Cupertino	CA	95014
THORNE ED	10467 Plum Tree Lane	Cupertino	CA	95014
VOGEL RK	1740 Donner Dr.	Santa Rosa	CA	95404
VAN GORDINER SB	2503 Bethaway	Orlando	FL	32806
WARE PN	8201 N.W. 37th St.	Coral Springs	FL	33065
WENTZ RL	Box 137	Hope	NJ	07844
WHITE RS	15825 S.W. 87th Ave.	Miami	FL	33157
WILLIAMS DD	Holstwig 20	1 Berlin 37		
AUSTIN RF	120 Candlewood Hgts.	New Milford	CT	06776
BARNES PD	35 Mistletoe Dr.	Covington	LA	70433
BEAN WS	Beeren Str. 32-34	1000 Berlin 37	W. Germany	
BENTLEY TR	3809 Wooded Creek Dr.	Farmers Branch	TX	75234
BOMBACH LA	547 W. Shore Tr.	Sparta	NJ	07871
BROWN RC	16750 S.W. 90 Ave.	Miami	FL	33157
DOUGHERTY DM	RD 7, Box 7544	Stroudsburg	PA	18360
ETHERSON JT	428 Norwood Court	Fort Myers	FL	33907
FENTNER CJ	5322 SW 118 Ave.	Cooper City	FL	33330
FOSTER MB	246 2nd Ave.	Santa Cruz	CA	95062
GILKES DE	917 Smith Dr.	Metairie	LA	70005
HANLEY MD	20400 SW 50th Pl.	Ft. Lauderdale	FL	33330
HASELBY JW	Tegel Flughaven	1000 Berlin 51	W. Germany	
HERRERA FM	Ten Rod Rd., RR 1, Box 472	Exeter	RI	02822
HYMAS HV	32492 RD 168	Visalia	CA	93291
JENKINS DW	8753 Wimbledon Dr.	Knoxville	TN	37923
KERREY TW	2100 Country Club Rd.	Eustis	FL	32726
KOSS CD	P.O. Drawer D	Miami Springs	FL	33266
KYLE AM	Blood St.	Lyme	CT	06371
LANGE RO	1099 31st Ave.	San Mateo	CA	94403
MARSHALL JF	5 Cove Lane	Eustis	FL	32726
McCABE JR	1001 Crescent Dr.	Greencastle	IN	46135

APPENDIX B

NAME	ADDRESS	CITY	ST	ZIP
O'CONNOR JH	101 Gray Rock Rd.	Trumbull	CT	06611
O'DELL T	307 Kent Dr.	Cocoa Beach	FL	32931
OVERBY WC	7802 Cherry Place Ct.	Humble	TX	77346
RICH RA	1205 W. Dunne Ave.	Morgan Hill	CA	95037
SAVOIE JC	6544 Harbour Rd.	N. Lauderdale	FL	33068
SAXON BF	1092 Serena Way	San Marcos	CA	92069
SCHLOTE FE	20 Roton Ave.	Rowayton	CT	06853
SCROGGIN GC	5325 SW 63d Ave.	Miami	FL	33155
SMITH DP	Rt. 1, Box 975B99	Pensacola	FL	32507
STULL FP	885 N.W. 6th Dr.	Boca Raton	FL	33432
TAYLOR JR	5116 S.W. 72d Ave.	Miami	FL	33155
WATERS DR	411 S.E. 13th Ave.	Pompano Beach	FL	33060
DOSS WW	14211 SW 104th Ave.	Miami	FL	33176
CRAHEN RR	3533 4th Lane, SW	Vero Beach	FL	32962
GAY HM	RD #1, Box 1329	Bangor	PA	18013
O'BRIEN SA	P.O. Box 1104	Hollister	CA	95024
STABENAU HM	20439 Interlachen Ln.	Troutdale	OR	97060
WOLF WA	Box 3016	Stateline	NV	89449
ZIESMER RA	501 29th Ave. Ct.	Poyallup	WA	98371
ALMQUIST GN	SR #1, Box 127-M	Hawley	PA	18428
ANDERSON AR	Wareneck P.O.	Wareneck	VA	23178
ACKINSON WP	Hohenzollern 1B	1000 Berlin 39		
BACON RN	348 Velma Dr.	Largo	FL	33540
BAILEY C	RR #5, Echo Valley Rd.	Newtown	CT	06420
BISH LW	752 Ridge Dr.	McLean	VA	22101
BROOKS RS	7440 NW 6th St.	Plantation	FL	33317
BURGER JJ	5 Woodsvale Rd.	Madison	CT	06443
BURROUGHS WJ, Jr.	9 Maple Ln.	Brookfield	CT	06804
CRAIG DC	1955 NW 108 Ln.	Coral Springs	FL	33065
COBB JP	Berlin Pilot Mail PAA Hangar 17 MR	Jamaica	NY	11430
CROSS RL	2225 Colusa Hwy.	Yuba City	CA	95991
FREDERIC GC	Box 6152	Incline Vlg.	NE	89450
FULLER BB	5072 Country Club Way	Pt. Orchard	WA	98366
GOELTZ FS	2168 Candelero	Santa Fe	NM	87505
HUMBLE RA	5770 SW 114th Ter.	Miami	FL	33156
HAWES LJ	1407 Ball Road	Eagle Pt.	OR	97527
KANE M	Johannisburgeralle 3	1 Berlin 19		
KELLEY R	295 Dayton Rd.	S. Glastonbury	CT	06073
KLEIN RL	Box 322	Rowayton	CT	06853
KELLEY EG	14300 Clayton Rd.	San Jose	CA	95127
LAMP RJ	6300 Rogers Circle	Lincoln	NE	68506
LEINBACH SP, Jr.	317 Fairmont Ave.	Winchester	VA	22601
LEWIS JW	Box 43 Star Rt.	Pleasant Mt.	PA	18453
LITTLEPAGE MJ	186 Vineyard Rd.	Huntington	NY	11743

APPENDIX B

NAME	ADDRESS	CITY	ST	ZIP
LONG TE	1530 Alabama Dr.	Winter Park	FL	32789
MEFFERT MD	Gelding Hill Rd.	Sandy Hook	CT	06482
McKAY DI	Teel Rd.	Fairfield	NY	13336
MERCIER RD	8 Gina Dr.	Centerport	NY	11721
NEUWALD EJ	Box 4074	Tequesta	FL	33458
NEWSTROM HM	Box 787	Somis	CA	93066
PANZER DA	Beergnstrasse Fa	1 Berlin 37		
PARRAGA WA	Box 3753	Incline Village	NY	89450
PENWELL GS	24290 Sailview Dr.	Elmira	OR	97437
PHILLIPS, CM	Fechnerstr. 16	1 Berlin 31		
REMELY B	518 N 17th Ave.	Bozeman	MT	59715
RHODES SS	1956 Port Cardiff Pl.	Newport Bch.	CA	92660
SMITH LW	Rt. 1, Box 420	White Salmon	WA	98672
SMITH W	Box 962	San Mateo	CA	94403

Opinion of the District Court

THE COURT: This is the decision of the Court.

After oral argument in open court, plaintiffs, John C. Cook, et al., have failed to demonstrate that the instant action is anything other than a collateral attack upon an order of this Civil Aeronautics Board ("CAB") that was not appealed in accordance with the provisions of Section 1006 of the Federal Aviation Act (49 USC Section 1486(a)).

Such challenges to an order of that agency directly contravene the comprehensive regulatory scheme established by Congress in the Federal Aviation Act of 1958.

It is by now well settled that federal district courts are powerless to adjudicate such actions. See City of *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334-337 (1958); *Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 512-513 (1953); *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 381-382 (1922); *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979); *Carey v. O'Donnell*, 506 F.2d 107, 110 (D.C. Cir. 1974); *Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973); *Oling v. Air Line Pilots Association*, 346 F.2d 270 (7th Cir. 1965).

Plaintiffs' reliance on *Clayton v. Republic Airlines, Inc.*, 716 F.2d 729 (9th Cir. 1983) is misplaced. As the Ninth Circuit explained in *Clayton*, the issue with which that court was confronted was one of first impression in the Ninth Circuit and had not been the subject of the holdings in *Carey*, *Kesinger*, or *Oling*.

See *Clayton v. Republic Airlines, Inc. surpa*, 716 F.2d at 730. See also *Zapp v. United Transp. Union*, 727 F.2d, 617, 627 n.16 (7th Cir. 1984).

Moreover, the court finds plaintiffs' reliance on *McDonald v. City of West Branch, Mich.*, 104 S. Ct. 1799 (1984) and *Alexander v. Gardner Denver Company*, 415 U.S. 36 (1974) unpersuasive. Stated simply, those cases are inapplicable to the instant context. In both *McDonald* and *Alexander* the Supreme Court

addressed the issue of whether or not a federal court may accord pre-inclusive effect to an unappealed arbitration award that had been rendered pursuant to a collective bargaining agreement. In both cases, the Supreme Court declined to hold that the arbitral award precluded, under the doctrine of *res judicata*, litigation under federal statutory schemes specifically designed to vest control over instances of discrimination with the judiciary.

The instant action, however, does not rise or fall with the doctrine of *res judicata*. Instead, plaintiffs are precluded from raising their claims in this court under the principle that collateral attacks in a federal district court on the orders of administrative agencies are not permitted. As the Supreme Court earlier explained in *City of Tacoma v. Taxpayers supra*, 357 U.S. at 336-37:

> "(U)pon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. For Congress, acting within its powers, has declared that the Court of Appeals shall have 'exclusive jurisdiction' to review such orders, and that its judgment 'shall be final,' subject to review by this Court upon certiorari or certification. Such statutory finality need not be labeled *res judicata*, estoppel, collateral estoppel, waiver, or the like, either by Congress or the courts."

Accordingly, the court is constrained to hold that it lacks subject-matter jurisdiction over the causes of action asserted in plaintiffs' complaint. Defendant Pan American World Airways, Inc.'s motion to dismiss the complaint is granted. The motions of defendants Air Line Pilots Association International, and Flight Engineers International Association, Pan Am Chapter, to dismiss the complaint or in the alternative for summary judgment are granted.

The motion of Charles P. Caudle and Vincent Wynne to intervene is denied as moot.

The respective motions shall be endorsed in accordance with the oral decision of this court.

The action is dismissed in its entirety without prejudice to the right of plaintiffs to petition the CAB for a reopening of the proceedings conducted in that forum or to seek relief in any other appropriate forum. No costs.

It is so ordered.

The clerk is directed to enter judgment in accordance with this decision.

Is there anything further?

Thank you.

I (We) hereby certify that the foregoing is a true and accurate transcript to the best of my (our) skill and ability from my (our) stenographic notes of this proceeding.

/S/ _____

Official Court Reporter

THE FEDERAL AVIATION ACT

Section 1006 (49 U.S.C. § 1486):

★ ★ ★

Judicial review

Orders subject to review; petition for review

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Notice to Board or Administrator; filing of record

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

Power of court

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm,

modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good order cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

Conclusiveness of findings of fact; objections

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Review by Supreme Court

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

★ ★ ★

Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,

Petitioners,

v.

JOHN C. COOK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is review of Petitioners' appeal of an interlocutory decision of the Second Circuit Court of Appeals a waste of this Court's resources?

2. Is the decision of the Second Circuit Court of Appeals that Respondents have alleged a "continuing violation" of the ADEA consistent with the decisions of this Court and the circuit courts, thereby presenting no new questions for this Court's review?

3. Is the decision of the Second Circuit Court of Appeals that Respondents' lawsuit is not a "collateral attack" on an order of the Civil Aeronautics Board consistent with the decisions of this Court and the circuit courts, thereby presenting no new questions for this Court's review?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-878

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER,

Petitioners,

v.

JOHN C. COOK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, John C. Cook, et al., file this brief opposing the Petition for Writ of Certiorari ("Petition") filed by Pan American World Airways, Inc. ("Pan Am"); Air Line Pilots Association, International ("ALPA"); Air Line Pilots Association, Pan Am Chapter ("ALPA-PAA"); Flight Engineers International Association ("FEIA"); and Flight Engineers International Association, Pan Am Chapter ("FEIA-PAA").

I. STATEMENT OF THE CASE

On March 7, 1984, the 439 Respondents filed a Complaint in the District Court alleging, *inter alia*, that Petitioners Pan Am, ALPA, ALPA-PAA, FEIA, and FEIA-PAA (collectively "Unions") had violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623-631 (1985), and New York Human Rights Law ("NYHRL"), N.Y. Exec. Law § 290, *et seq.* (1985), in implementing Pan Am's pilot seniority system. The Respondents filed this action as individual Plaintiffs pursuant to the ADEA, which incorporates by reference Sections 16(b) and 17, 29 U.S.C. §§ 216(b) and 217 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.* (1985). Respondents are not organized as an incorporated or unincorporated association. Respondents are all over 40 years of age, are and/or have been employed as pilots and/or flight engineers by Petitioner Pan Am and are members and/or apprentice members of Petitioner Unions.

Pan Am merged with National Airlines ("National") in 1980. Petitioner Unions submitted to an arbitrator the integration of the pilot and flight engineer seniority lists of the two merging companies. Petitioners ALPA and FEIA, through their respective chapters, represented Pan Am and National pilots and flight enginers. Pan Am expressly reserved the right to accept or reject the resulting arbitration award (the "Gill Award") which was issued on March 12, 1981. Pan Am subsequently accepted and later implemented the award in its entirety. See, Affidavit of Mr. Harold M. Gay, Appendix C, attached hereto (without exhibits which were part of record below).

Immediately after the issuance of the Gill Award, the integrated seniority list was challenged before the Civil Aeronautics Board ("CAB") by two groups of aggrieved Pan Am airmen. One group called itself "Pan American Pilots Fighting" ("PAPF") and was composed of uniden-

:ified active Pan Am airmen. The other group called itself the "Janus Group", an association of Pan Am airmen on furlough at the time the Gill Award was issued. The Petition of PAPF to Set Aside Arbitration Award and Agreement to Accept Award ("PAPF petition") was filed June 13, 1981. The PAPF petition contended that the integrated list was "unfair and inequitable" under the standard applied by the CAB to integrated airline seniority lists under the Federal Aviation Act, 49 U.S.C. § 1301 *et seq.* (1985). The PAPF petition did not include any claim or discussion of employment discrimination. The CAB ruled on PAPF's and the Janus Group's petitions in Order 82-4-75 (1982). The CAB did not set aside Pan Am's integrated pilot seniority list. *See,* Order 82-4-75 at 14, (Appendix A, attached hereto).

The integrated seniority system, as accepted by Pan Am, had not been posted by Pan Am at the time pleadings were filed before the CAB in the above proceeding. *See,* Petition, p. 6-7. The integrated seniority system was first implemented on a system-wide basis to the Respondents' disadvantage on March 28, 1983 and has been implemented continuously up until the present time. *See,* Affidavit of Mr. Harold M. Gay, Appendix C. Furthermore, Pan Am has exercised and continues to exercise wide discretion in implementing the pilot seniority system constructed under the Gill Award. *See* Affidavit of Mr. Harold M. Gay, Appendix C Respondents contend that Petitioner Unions have supported and/or acquiesced in such implementation and that the conduct of all parties violates the ADEA and the NYHRL.

II. REASONS THE WRIT SHOULD BE DENIED

A. Petitioners Are Appealing An Interlocutory Decision Of The Second Circuit Court Of Appeals, The Review Of Which By This Court At This Time Would Be A Waste Of This Court's Resources.

The Second Circuit Court of Appeals remanded this case to the United States District Court for the Southern District of New York for further proceedings consistent with the Second Circuit's opinion. Accordingly, Petitioners are asking this Court to grant a Writ of Certiorari in connection with an interlocutory decision. Rule 17 of the Supreme Court Rules states that "[a] review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." S. Ct. R. 17. This case does not present special and important reasons for review, and the Petition should accordingly be denied. This Court has stated in considering whether or not a Writ of Certiorari should be granted as to an interlocutory decision of a circuit court of appeals:

> While this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the courts of appeals, *it is a power which will be sparingly exercised*, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the Courts of a State, for some matter affecting the interest of this nation in its internal or external relations, demands such exercise.

Forsythe v. Hammond, 166 U.S. 506 (1896).

Respondents urge the Court to refrain from exercising this discretionary power of review in the absence of those circumstances outlined in *Hammond* and its own Rule 17.

Respondents recognize that the Court is not limited to those circumstances ennumerated by Rule 17. However, the absence of these factors is nonetheless significant to the Court's decision. *Watt v. Alaska*, 451 U.S. 259 (1981) (J. Stevens concurring). Furthermore, the fact that the present case is in the early stages of discovery and that the substantive issues remain largely undeveloped strongly demonstrates the improvidence of granting a Writ of Certiorari at this time. Accordingly, the Petition should be denied.

B. The Decision of the Second Circuit Court of Appeals on the Issue of Whether Respondents Have Alleged a "Continuing Violation" of the ADEA is Consistent with the Decisions of This Court and the Circuit Courts, and Presents No New Questions for This Court's Review.

Petitioners contend that this Court should review the Second Circuit's decision that Respondents' claims allege "continuing" violations of the ADEA in connection with the implementation and adoption of the pilot seniority system. Respondents disagree. This Court need not review the Second Circuit's decision on this issue, because it is wholly consistent with all applicable Supreme Court and federal appellate court precedent. Even assuming, *arguendo*, that Petitioners' ADEA violations in this case are not "continuing", Respondents' cause of action is not time-barred. Respondents properly filed administrative charges as to the Pan Am pilot seniority system within 300 days of the date when it first directly affected them. In any event, all issues regarding the dates of the unlawful occurrences in this case, and the dates upon which Respondents first filed administrative charges as to such occurrences, comprise factual disputes which can only be resolved at trial.

The ADEA requires that an individual wishing to challenge an illegal employment practice on age discrimina-

tion grounds must file an administrative charge with the federal EEOC within 180 days, or with a state equal employment agency (as Respondents so filed) within 300 days, of its occurrence. 29 U.S.C. § 626(d) (1985). In dismissing Petitioners' argument that Respondents' ADEA claims are time-barred, the Second Circuit stated as follows:

> When employees are hired or refused employment pursuant to a continuous policy of discrimination, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it . . . (Citations omitted.) *Adoption of a seniority system, if discriminatory as to age, constitutes a continuing violation of the ADEA* as long as that system is maintained by the employer. (Citations omitted.)

Cook v. Pan American World Airways, Inc., 771 F.2d 635 (2d Cir. 1985) (Petition, Appendix 1, p. A-25—A-26) (emphasis added), citing *Miller v. I.T.&T.*, 755 F.2d 20, 25 (2d Cir. 1985); *Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 274 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Morelock v. NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *EEOC v. Home Insurance Co.*, 553 F. Supp. 704 (S.D.N.Y. 1982). Applying the above-stated principles, the Second Circuit held in *Cook* that "the *alleged discriminatory violations in the present case* must be classified as *continuous ones*, giving rise to claims accruing in favor of each plaintiff on each occasion when the merged seniority list was applied to him." *Id.* (emphasis added.) Each of the cases cited by the Second Circuit to support its decision involved claims similar to those raised by Respondents here, *i.e.*, that an employer's adoption and implementation of a particular policy, such as a seniority system, constituted an on-going practice of employment discrimination.

The Second Circuit's decision is consistent with all of this Court's rulings on the time limitations imposed on filing employment discrimination charges and lawsuits. *See Chardon v. Fernandez*, 454 U.S. 6 (1981); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 552 (1977). Petitioners attempt to contrive a conflict between the Second Circuit's decision in this case and this Court's holdings in *Ricks*, 449 U.S. 250, and *Evans*, 431 U.S. 552. As shown below, no such conflict exists.

This Court held in *Ricks* that the cause of action of the plaintiff, a college professor, accrued when he received notice that he was to be denied tenure, rather than when his contract actually terminated. Hence, plaintiff's charges, filed within the statutory period after his contract terminated but not after he received notice thereof, were held untimely. Petitioners quote *Ricks* with approval: "The proper focus (as to timeliness) is upon the time of discriminatory acts, not upon the time at which the consequences of the acts become most painful." *Id.* at 258. Contrary to Petitioners' misguided interpretation, the Second Circuit's decision comports with this holding.

The proper application of *Ricks* to the present case is contained in *EEOC v. Westinghouse Electric Corp.*, 33 FEP 390 (3rd Cir. 1983). The court in *Westinghouse* held that even though the adoption of a discriminatory policy constituted an unlawful employment practice, a cause of action against the policy could not accrue until the policy manifested itself through actual application to individual employees: "The mere adoption of this controversial policy in and of itself cannot be considered to constitute notice of the alleged discrimination." *Id.* The *Westinghouse* court declined to credit employees with "mystical powers of omniscience" whereby they could discern management's plans and projections. The pilots/

flight engineers who are Respondents here cannot be considered to possess such powers either. *Ricks* does *not* hold that a plaintiff's claim accrues on the first date on which the *potential* for discrimination existed, as Petitioners attempt to argue. In this case, *Ricks* simply requires that pilots affected by a particular set of reassignments and/or furloughs effectuated under the Pan Am pilot seniority system file administrative charges within the statutory time period after the date they receive final notice of the pending reassignments and/or furloughs, rather than the date on which they are actually demoted or laid off. Respondents have complied with this requirement. In fact, Respondents could still file "fresh" charges at any time, since Petitioner Pan Am continues to this day to effectuate discriminatory pilot reassignments under the challenged system.

Petitioners also grossly mischaracterize this Court's holding in *Evans*. The plaintiff in *Evans* was employed by United Air Lines ("United") as a flight attendant from November 1966 to February 1968. She was forced to resign in 1968 because of United's then-prevailing policy of refusing to allow its female flight attendants to be married. It was subsequently decided that such a policy violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1985) ("Title VII"). When the plaintiff in *Evans* was reinstated, she charged that her loss of seniority rights for the period between 1968 and 1972 constituted a second violation of Title VII. Plaintiff contended that because her subordinated position on the seniority list had a continuing impact on her pay and fringe benefits, United was guilty of a present and continuing violation of Title VII, and therefore her claim was timely. This Court held that where a seniority system *only* gives present effect to a *past* act of discrimination, it does not constitute a continuing violation of Title VII. Petitioners quote the Court as stating that "the emphasis should not be placed on mere continuity; the

critical question is whether any present *violation* exists." *Id.* at 1889. What Petitioners do *not* quote are the next two sentences:

> [Plaintiff] *has not alleged that the system discriminates* against former female employees or that it treats former employees who are discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason. *In short, the system is neutral in its operation.*

Id. (emphasis added.)

In *Evans*, the only allegation of employment discrimination which the plaintiff could raise occurred in the period before she was even assigned the seniority position of which she complained. She could allege nothing to indicate that United's seniority system treated "existing female employees differently from existing male employees . . . (She) has failed to allege that United's seniority system differentiates between similarly situated males and females on the basis of sex." *Id.* Respondents' Complaint, by contrast, avers that Pan Am's pilot seniority system is *not* "neutral in its operation." *See* Respondents' Complaint, attached hereto as Appendix B, paragraphs 11-18 (without appendices which are part of the Petition). Respondents have specifically charged that by their present and continuing implementation of this seniority system by new pilot assignments, furloughs, and other actions, Petitioners commit willful and continuous acts of discrimination in violation of the ADEA.

Indeed, *Evans* supports the Respondents' position by acknowledging that if the plaintiff in that case *had* been able to allege present and continuing discrimination in the operation of the disputed seniority system, as do the Respondents here, the continuing violation theory would have been applicable. In sum, the Second Circuit's decision is perfectly consistent with this Court's holdings and statements on the timeliness of employment discrimination charges and lawsuits.

Furthermore, the Second Circuit's decision is consistent with those of *every* Circuit which has confronted this issue in the context of claims similar to those of Respondents. Appellate courts in *nine* circuits have faced the issue of whether a "continuous" employment practice can be challenged as violating federal anti-discrimination statutes during the entire duration of its implementation. *All* have rendered decisions in favor of plaintiffs and consistent with that of the Second Circuit in this case. *See, e.g., Guardian Ass'n of New York City v. Civil Serv.*, 633 F.2d 232 (2d Cir.), *cert. den'd*, 452 U.S. 940 (1980); *Acha v. Beame*, 570 F.2d 57 (2d Cir. 1978); *Bethel v. Jendoco*, 570 F.2d 1168 (3d Cir. 1978); *Clark v. Olinkraft Inc.*, 556 F.2d 1219 (5th Cir. 1977); *Held v. Gulf Oil Co.*, 684 F.2d 527 (6th Cir. 1982); *Morelock*, 586 F.2d 1096 (6th Cir.); *Cox v. United States Gypsum Co.*, 409 F.2d 209 (7th Cir. 1969); *Cedeck v. Hamiltonian Federal Sav. & Loan Ass'n*, 551 F.2d 1136 (8th Cir. 1977); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757 (9th Cir. 1980); *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973).

The employment discrimination cases cited by Petitioners as supposedly undercutting the Second Circuit's decision are in fact irrelevant to it.[1] Without exception, the facts in those cases parallel, and the holdings thus rely upon, either *Ricks*[2] or *Evans*[3] and are thus inapplicable

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[1] *See Bronze Shields, Inc. v. N.J. Dept. of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981); *Aronsen v. Crown Zellerbach*, 662 F.2d 584 (9th Cir. 1981); *Fowler v. Birmingham News Co.*, 608 F.2d 1055 (5th Cir. 1979); *Trabucco v. Delta Airlines, Inc.*, 590 F.2d 315 (6th Cir. 1979); *Farris v. Bd. of Ed. of City of St. Louis*, 576 F.2d 765 (8th Cir. 1978); *Lockhart v. Firestone Tire & Rubber Co.*, 454 F. Supp. 191 (E.D. Va. 1970).

[2] *See Bronze Shields*, 667 F.2d 1074; and *Aronsen*, 662 F.2d 584.

[3] *See Fowler*, 608 F.2d 1055; *Farris*, 576 F.2d 765; *Trabucco*, 590 F.2d 315; and *Lockhart*, 454 F. Supp. 191.

here, for the same reasons set forth in the above discussion of *Ricks* and *Evans*. For example, Petitioners rely heavily on the inapposite *Bronze Shields, Inc. v. N.J. Dept. of Civil Serv.*, 667 F.2d 1074 (3d Cir. 1981). In that case, candidates for police officer positions broadly charged that a hiring roster, from which defendants were to select all police officers, was race discriminatory. But plaintiffs only specifically alleged discrimination in the defendants' administration of a test which was the first step of a multi-step selection process and determined which candidates would be eliminated from further consideration for the police officer positions. After these candidates had already been eliminated, the remaining candidates were, in a separate action undertaken by defendants, placed on the disputed hiring roster in accordance with the results of the test. Plaintiffs in *Bronze Shields* did not allege that defendants' placement of the remaining candidates on the roster, nor that defendants' subsequent actions based on the roster, were discriminatory. Hence, the court held as untimely administrative charges filed within 300 days of the construction of the roster but not of the issuance of the results of the allegedly discriminatory test. By contrast, Respondents allege that the Petitioner violated the ADEA in the *actual construction and implementation* of the Pan Am pilot system, and hence their lawsuit is timely.

Contrary to Petitioners' far-fetched assertion that it would disturb for employers "economic predictability in an uncertain world," the Second Circuit's decision strikes the proper balance between the interests of employers and employees in the enforcement of time limitations on employment discrimination charges. The traditional rationale for such limitations is that employers "should not be unreasonably burdened with preserving for years complete records of each and every employment decision." *Erdmann v. Bd. of Educ. Union City Reg. High School*, 541 F. Supp. 388 (D. N.J. 1982). The continuing viola-

tion theory recognizes that, when a seniority system is the subject of a discriminatory charge, "the defendant employer is not burdened with the necessity of justifying each particular instance of alleged discrimination, but rather may successfully defend against all claims by justifying the practice challenged as a whole." *Id.* at 393. As noted by the Second Circuit in *EEOC v. Home Insurance Co.*, 553 F. Supp. at 713:

> [Where a continuing violation can be alleged] the concern respecting production of evidence as to past acts is considerably diminished. *Simply put, an employer that maintains a continuing violation neither deserves nor obtains repose.*

Id. (emphasis added).

Even if the discriminatory acts committed by Petitioners were not "continuing" in nature, as they clearly are, Respondents' ADEA cause of action is still timely.

Petitioners allege that the seniority list complained about in this case was implemented, at the latest, in September 1981, when it was allegedly first posted. Petition at 6-7. Therefore, according to Petitioners, because the administrative charges which are made the basis of this action were not filed with the EEOC until April 12, 1983, such charges were not filed within 300 days of the alleged illegal occurrence and thus should be dismissed. Respondents disagree. As demonstrated by the affidavits of Mr. Harold M. Gay, Jr., Mr. Charles E. Eager and Mr. Robert L. Jarboe (attached hereto as Appendix C), the seniority system adopted by Pan Am and complained about in this case was not implemented to Respondents' detriment or disadvantage until March 28, 1983. On that date, numerous plaintiffs were for the first time demoted and three plaintiffs were first notified that they were to be furloughed as a result of the operation of Pan Am's pilot seniority system. No Pan Am pilot over age 40 suffered discriminatory demotion as a result of the Pan

Am pilot seniority system until that date. Hence, Respondents' cause of action arose when Pan Am's pilot seniority system first directly affected them, on March 28, 1983. *See* affidavits of Messrs. Gay, Jarboe and Eager.

In any event, Respondents note that it is well established that any question concerning the date of occurrence of an alleged discriminatory practice is a question of fact which must be resolved at trial. *See, e.g., Reed*, 613 F.2d at 761; *Leite v. Kennecott Copper Corp.*, 558 F. Supp. 1170 (D.C. Mass), *aff'd*, 720 F.2d 658 (1st Cir. 1983). Hence, this issue would not be a proper subject for review by this Court.

C. The Decision of the Second Circuit Court of Appeals on the Collateral Attack Issue Is Consistent With The Decisions of This Court and the Circuit Courts and Presents No New Questions for this Court's Review.

The Second Circuit held that because the ADEA provides for *de novo* adjudication of age discrimination claims, and because the CAB lacked the authority or expertise to adjudicate the age discrimination issues presented in this case, Respondents' lawsuit is not barred as a "collateral attack" on a CAB order. The Second Circuit correctly stated that the starting point for consideration of whether Respondents' lawsuit is barred by virtue of the previous CAB proceeding lies in Supreme Court decisions upholding *de novo* judicial determination of claims asserted under federal laws similar to the ADEA.[4] Such cases, and Respondents' entitlement to a jury trial of their ADEA claims, form the basis of the Second Circuit's decision—a basis which Petitioners neglect to even mention in their Petition.

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[4] *See, e.g., McDonald v. City of West Branch*, —— U.S. ——, 104 S.Ct. 1799 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

1. *The Second Circuit Court of Appeals properly followed decisions of this Court and the circuit courts entitling Respondents to a jury trial in U.S. district court of their employment discrimination complaint.*

The ADEA entitles Respondents to a jury trial of their age discrimination claims in a United States district court. The ADEA specifically states:

> 7(c)(1). Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Chapter . . . (2) any person filing an action under (1) above shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Chapter, regardless of whether equitable relief is sought by any party in such action.

29 U.S.C. § 626(c) (1985).

The Second Circuit's decision is consistent with the decisions of this Court and the decisions of other federal courts of appeal which have interpreted this provision of the ADEA. Specifically, as the Second Circuit indicated, its decision in this case is consistent with this Court's decisions in *McDonald v. City of West Branch*, —— U.S. ——, 104 S.Ct. 1799 (1984), *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Baldwin v. New York*, 399 U.S. 66 (1970).

The ADEA was enacted three years after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1985). With a few minor exceptions, the prohibitions of the ADEA are in terms identical to those of Title VII. *Hodgson v. First Fed. Sav. & Loan Ass'n*, 455 F.2d 818 (5th Cir. 1972). Courts have traditionally applied interpretations of Title VII's provisions, particularly those vesting substantive employment rights, to cases arising under the ADEA. *Id.* at 820.

One of the established principles of Title VII, and hence ADEA, case law is that jurisdiction over civil actions under these statutes lies exclusively in the federal courts. *Gardner-Denver*, 415 U.S. at 36; *Dickinson v. Chrysler Corp.*, 456 F. Supp. 43 (E.D. Mich. 1978). No federal or state agency can intrude on the "ultimate responsibility" held by the federal courts to enforce federal employment discrimination statutes. *Kremer*, 456 U.S. at 469. The Second Circuit's decision is consistent with these principles.

Plaintiffs in both ADEA and Title VII actions are entitled to a *de novo* adjudication of their claims (*i.e.*, an adjudication which guarantees an opportunity to present all relevant factual evidence for fresh determination by a federal district court factfinder). *Kremer*, 456 U.S. at 469; *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Second Circuit's decision properly safeguards this right. Even the administrative rulings of the EEOC, the agency which was created by Congress for the specific purpose of monitoring enforcement of federal employment discrimination laws and which has far greater experience and expertise in this area than the CAB, are subject to *de novo* adjudication in federal court. *McDonnell-Douglas*, 411 U.S. at 799. *See also Kremer*, 456 U.S. at 469. The establishment of such a *de novo* federal court procedure was motivated by Congress' fear that officers of administrative agencies would be prone to political pressures and thus unable to impartially adjudicate employment discrimination claims. *See Chandler v. Roudebush*, 425 U.S. 844 (1976).

The terms of the ADEA, which expressly provide litigants with a right to a jury trial of age discrimination claims, and this Court's holdings requiring that trials of *any* federal employment discrimination claim be *de novo*, are violated if a plaintiff is barred from obtaining a full-fledged adversarial proceeding on such claims in federal court. *See Gardner-Denver*, 415 U.S. 36. The Second Cir-

cuit's decision in this case in consistent with and follows *Gardner-Denver*. In comparing the procedures followed in federal court with those followed in a labor arbitration, this Court stated in that case:

> The factfinding process in arbitration is not equivalent to judicial factfinding. The *record* of the arbitration proceedings *is not as complete*; the usual *rules of evidence do not apply*; and rights and procedures common to civil trials, such as *discovery, compulsory process, cross-examination* and *testimony under oath*, are often *severely limited or unavailable*. *See Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956); *Wilko v. Swan*, 346 U.S. 427 (1953).

415 U.S. at 1024 (emphasis added). The Court in *Gardner-Denver* held that an arbitration is a less appropriate forum for final resolution of Title VII issues than a federal court, and that a Title VII litigant is entitled to a trial *de novo* in federal court of his discrimination claims even if he had completely litigated such claims in an arbitration proceeding which resulted in an unfavorable outcome. *See also McDonald*, 104 S.Ct. 1799 (1984).

For the following two reasons, Respondents' entitlement to a federal court jury trial of their ADEA claims is more substantial than that of the plaintiffs in *Gardner-Denver*, who successfully argued that they had a right to a federal court trial of their Title VII claims:

1. The arbitration procedure which this Court deemed inadequate to make a final determination in a discrimination case generally involves a much more rigorous factfinding process than was conducted by the CAB in relation to the PAPF petition. *See* Order 82-4-75 at 4, attached hereto as Appendix A.

2. Unlike in *Gardner-Denver*, where the same discrimination claim was presented to an arbitrator and then to a federal district court, the Complaint filed in District Court by Respondents con-

> tained a totally different set of factual and legal contentions than were embodied in the PAPF petition and ruled upon by the CAB.

In connection with the first reason stated above, Respondents note that the CAB proceeding on the PAPF petition that resulted in Order 82-4-75 provided none of the safeguards mandated by *Gardner-Denver*, and, unlike an arbitration proceeding, did not include an evidentiary hearing or provide the parties an opportunity to cross-examine witnesses. *See* Order 82-4-75 at 4 (Appendix A). Even if ADEA claims had been asserted before the CAB, which they were not, the procedures utilized by the CAB would have been less adequate than the arbitration procedure deemed unsatisfactory in *Gardner-Denver*. In processing the PAPF petition, the CAB did not compile a record of the sort of statistical evidence which substantiates Respondents' Complaint here. *Id.* In fact, when PAPF submitted for the CAB's consideration seniority lists in support of its claim that the integrated system was not "fair and equitable" under the Federal Aviation Act, the CAB refused to consider such documents and stated:

> [PAPF's] material contains facts about named employees' seniority. We do not rely upon this information in ruling on PAPF's Petition; therefore, its disclosure to the parties in the proceeding or the public is unnecessary. The material will be returned to PAPF after the instant order issues.

Id. In accordance with its standard procedures, the CAB expressly restricted its inquiry by stating:

> [*Our responsibility*] *is confined to examining whether the arbitration* [*which yielded the Gill Award*] *was fairly and equitably conducted.*

Order 82-4-75 at 4.

Furthermore, PAPF's petition and documents were submitted to the CAB on June 13, 1981, before Pan Am

had even posted the integrated pilot seniority list. *See* Petition at 6-7. As Petitioners admit and as the Second Circuit made clear, age discrimination claims were never raised before the CAB, and even if such claims had been raised, the CAB would not and could not have afforded Respondents the factfinding process guaranteed them by the ADEA and *Gardner-Denver*. As was pointed out by the Second Circuit, the CAB (now Department of Transportation ["DOT"]) has no interest or expertise in age discrimination matters. In a 1981 order, the CAB acknowledged that "our jurisdiction is limited, we lack expertise in labor relations, and there are better equipped, more competent forums available to handle labor disputes." *Texas International/Continental Acquisition Cases*, CAB Order 81-10-66, at 11.[5]

In connection with the second reason stated above in support of Respondents' argument that their right to a federal court trial is more substantial than that asserted in *Gardner-Denver*, Respondents state that their Complaint contains totally different legal and factual contentions than those contained in the PAPF petition ruled on by the CAB. Respondents' Complaint in this case, as well as the affidavits and exhibits supporting Respondents' opposition to dismissal, allege that Petitioners have violated the ADEA and NYHRL in the adoption and implementation of the Pan Am pilot seniority system. *See* Complaint (attached hereto as Appendix B). The PAPF petition to the CAB did not so allege. Respondents' Complaint goes far beyond the PAPF petition in alleging that the implementation of the integrated pilot seniority lists

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[5] The CAB monitored the Pan Am-National merger to assure that it was "consistent with the public interest", 49 U.S.C. § 1378 (1985), and imposed a condition that the companies' seniority lists be integrated in a "fair and equitable" manner (to minimize the possibility of labor unrest which would inconvenience the traveling public). That was the extent of its authority, or even interest, in this matter.

of Pan Am and National, continuing to this day, violates federal and state age discrimination statutes. These allegations of on-going violations, and in fact all of Respondents' contentions in this case, are separate and apart from the question of whether the integration of Pan Am's and National's pilot seniority lists was procedurally fair, such being the issue considered by the CAB. By contrast, the plaintiff's discrimination allegations in *Gardner-Denver* had been specifically raised before and decided by an arbitrator, and this Court still considered a federal court trial to be required. Such a trial is clearly required in this case also, and the Second Circuit's decision on this issue is consistent with this Court's decision in *Gardner-Denver.*

Even had the Respondents raised their ADEA claims to the CAB, the Court of Appeals for the District of Columbia Circuit would not have reviewed those claims *de novo.* The appellate court's review of an order such as that issued by the CAB is limited to whether it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1985). Hence, the appellate court would have been called upon to determine the merits of an employment discrimination claim by simply reviewing the record of proceedings before an administrative agency. In *Chandler, supra,* this Court explicitly rejected such an attenuated standard of review as an unacceptable substitute for a federal district court's *de novo* adjudication of an employment discrimination complaint. 425 U.S. at 843-844. Furthermore, even if such a review of the CAB's Order by the D.C. Circuit could have been *de novo* (which it could not) and even if such a review could have dealt with Respondents' ADEA claims (which it could not as PAPF never asserted and the CAB never considered such), review of the CAB's Order by the D.C. Circuit obviously could not deal with Respondents' ADEA claims relating to events which have occurred since the CAB issued its Order.

The Second Circuit's rejection of Petitioners' assertions is proper and consistent with rulings of this Court.

2. *The decision of the Second Circuit Court of Appeals is consistent with the decisions of this Court and the circuit courts on the collateral attack issue.*

Petitioners mistakenly argue that the Second Circuit decision conflicts with Supreme Court and federal circuit court precedent on the collateral attack issue. On the contrary, the Second Circuit decision is wholly consistent with such precedent.

The collateral attack doctrine holds that where Congress has prescribed the "specific, complete and exclusive" mode for judicial review of an administrative agency's orders, alternative avenues of appeal are prohibited. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). The collateral attack doctrine is properly applied in cases in which "it is unlikely that Congress intended for . . . petitioners to have two bites at the apple—that is, to be able to challenge the order in a court of appeals on the basis of an administrative record, and if unsuccessful, to litigate all issues *de novo* in the district court with the right of appeal to the court of appeals." *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496 (D.C. Cir. 1977). The doctrine's rationale has been explained by this Court as follows:

> Where Congress has provided statutory review procedures designated to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive . . . [Congress intended] to permit an agency, expert in [particular] matters, to explore and pass on the ramifications of [those matters].

Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965).

As age discrimination allegations were not raised before the CAB and as PAPF is not synonymous with the Respondents herein, Respondents are not attempting via this litigation to obtain "two bites of the apple." In addition, the collateral attack doctrine is plainly inapplicable to the present case because Congress explicitly designated the federal courts and the EEOC as the repositories of expertise on employment discrimination and has accordingly placed exclusive authority over such claims in those forums. The CAB simply did not have the authority to issue a final determination on an employment discrimination claim, and clearly indicated that its Order did not decide such issues. The factual and legal issues raised by the Complaint in this case were not subjected to the scrutiny of the CAB, nor should they have been.

Clearly, as shown above, the Second Circuit's decision accords with this Court's interpretation of the collateral attack doctrine, as enunciated in cases such as *City of Tacoma* and *Whitney Nat'l Bank*, *supra*. Specifically, the Second Circuit's decision does not conflict with this Court's decision in *City of Tacoma*, 357 U.S. at 320, as argued by Petitioners. The Court in *City of Tacoma* invoked the collateral attack doctrine in barring a state court action on the grounds that the plaintiffs raised the identical issue in the court (*i.e.*, the legality of a license issued by a federal administrative agency) that it had earlier raised before the agency itself. This Court also found the agency competent to decide the issue. As the Second Circuit indicated, the collateral attack doctrine does not bar a lawsuit where, unlike in *City of Tacoma*, the administrative agency, here the CAB, is neither authorized nor competent to decide the issue later raised in a separate action. The district court has jurisdiction to entertain such a later claim. *See, e.g., Beins v. United States*, 695 F.2d 591 (D.C. Cir. 1982).

Regarding the decisions of other circuits, Petitioners claim that the Second Circuit's decision conflicts with *Carey v. O'Donnell*, 506 F.2d 107 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973); and *Oling v. Airline Pilots Ass'n*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965). Petitioners' argument is without merit. As the Second Circuit correctly pointed out, no ADEA, Title VII or similar claims were asserted in *Kesinger* or *Oling*, nor was the substantive fairness of integrated seniority lists even adjudicated in those cases. Rather, *Kesinger* and *Oling* dealt with whether the unions had breached their duty of fair representation before the CAB. This issue was clearly within the CAB's expertise, as employment discrimination issues are just as clearly not. Hence, the rulings in *Kesinger* and *Oling* barring the relitigation of CAB issues were properly distinguished by the Second Circuit from this case.

The Second Circuit also deemed inapplicable the D.C. Circuit's decision in *Carey*, 506 F.2d at 107. Petitioners contend that the Second Circuit's treatment of *Carey* justifies this Court's review of its decision. Respondents disagree, for two reasons.

First, the D.C. Circuit has since limited the applicability of *Carey* by deciding *Beins v. United States*, 695 F.2d 591 (D.C. Cir. 1982). In *Beins*, the D.C. Circuit held that a pilot who had been denied an airman medical certificate by the Federal Aviation Administration ("FAA") could maintain an action in U.S. district court against the FAA under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671, *et seq.* (1985). The court ruled that the pilot was not restricted to appealing the FAA's action directly to the D.C. Circuit under Section 1006 of the Federal Aviation Act, 49 U.S.C. § 1486 (a) (1985), but could obtain a trial of his FTCA claims in

district court. *Beins* effectively limits the reach of *Carey* to cases in which (1) appeal of an agency order to the court of appeals would provide "an adequate means of reviewing Appellants' allegations in the district court suit," (2) the Appellants are seeking a remedy in the district court which they could have obtained in the court of appeals; and (3) Congress has not established a separate statutory procedure as a means of adjudicating the subject matter at issue. *Id.* at 598 and fn. 11. None of these requirements is present in this case. By implication, the current position of the D.C. Circuit on this issue accords with that expressed by the Second Circuit in this case.

Second, to the extent *Carey* would nullify the rights of ADEA litigants to federal court jury trials of their claims, it has been rendered meaningless by *Chandler v. Roudebush*, 425 U.S. 844 (1976). *Chandler* and other cases decided after *Carey* have assured all litigants of a trial *de novo* of federal discrimination complaints, even following determination of such claims by administrative agencies with employment discrimination expertise. As indicated above, the CAB clearly has no such expertise.

The Second Circuit's decision in this case is thus not inconsistent with the D.C. Circuit's prevailing interpretation of *Carey*, nor with the view of any other circuit on the collateral attack issue. Even if the construction of *Carey* advanced by Petitioners could be considered the law of the D.C. Circuit and applicable here, which it cannot for the reasons stated above, such construction would be at odds with *McDonald, supra, and Gardner-Denver, supra*, decisions of this Court which must control. This Court has repeatedly defended and protected the right of all litigants to a trial *de novo* of federal discrimination complaints. It should not now allow Petitioners to erode that right.

III. CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

Order 82-4-75

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at is office in Washington, D.C.,
on the 15th day of April, 1982

Docket 33283

In the matter of

PAN AMERICAN-ACQUISITION OF CONTROL
OF, AND MERGER WITH NATIONAL

Motion of flight enginers formerly in the employ of National for confirmation and enforcement of arbitration award;

Petition of Janus Group to set aside arbitration award; and

Petition of Pan American Pilots Fighting to set aside arbitration award.

ORDER DISMISSING MOTION AND PETITIONS

This proceeding arises out of Pan American World Airways' acquisition of control of and merger with National Airlines, effective January 19, 1980, which the Board approved by Orders 79-12-163/164/165. Before the Board are three requests concerning an arbitration award which resolved disputes among National and Pan American flight engineers and pilots about their integrated seniority at the combined carrier, Pan American. The award established, from the employees' standpoint, two integrated seniority lists for the merged employee groups.

When the lists were presented to Pan American by the employees' bargaining representatives, the carrier accepted and implemented them.[1]

Flight enginers formerly employed by National, apparently sponsored by National Enginers, have filed a "Motion for Confirmation and Enforcement of [the] Arbitration Award." Petitions to set aside the award have been filed by (1) Janus Group, a group formed at the time of approval proceedings before the Board to represent 510 furloughed (premerged) Pan American crewmen; and (2) Pan American Pilots Fighting ("PAPF"), a group of unidentified (premerged) Pan American crewmen who joined together after the arbitration award issued to oppose it.

Our jurisdiction to consider the requests stems from section 408 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1378, which subjects air carrier acquisitions and mergers to Board approval upon terms and conditions that are just and reasonable. In following this mandate, we impose and retain jurisdiction over labor protective provisions ("LPP's") benefitting employees at combining companies in certain ways. The basis for the relief sought in the motion and petitions would be, therefore, that merged Pan American and the bargaining representatives for flight deck personnel at premerged National and Pan American failed to inte-

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[1] The Flight Engineers' International Association ("FEIA") was the certified collective-bargaining agent, under the Railway Labor Act, for flight engineers at National and Pan American through its respective airline chapters. The Air Line Pilots Association, International ("ALPA"), through its master executive councils at each airline, was the agent for the carriers' pilots. Such agents are the appropriate representatives of employees affected by an acquisition or merger for purposes of bargaining with the combined carrier about integrated seniority. These four labor representatives (herein called National Engineers, Pan Am Engineers, National Pilots, and Pan Am Pilots) were the parties to the arbitration in issue.

grate seniority as required by the LPP's in our approval order which provide that,

> Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

We have long held that, pursuant to section 3, the surviving carrier of an acquisition or merger and the affected employees (by their representatives in terms of the Railway Labor Act if they are organized) are responsible for integrating seniority lists. Only when the carrier and the employees/representatives disagree on seniority do we intrude, by ensuring that the parties arbitrate.

> Section 13(a). In the event that any dispute or controversy * * * arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator * * *. The decision of the arbitrator shall be final and binding on the parties.

Here, the four representatives for cockpit crew members affected by the acquisition agreed to a procedure for determining, among themselves, how to integrate seniority. The procedure required final and binding arbitration if they could not decide upon an integrated seniority proposal to submit to Pan American. The procedure also required that the representatives jointly support, in collective bargaining with the company, the proposal thus formulated. Nevertheless, we are presented with a claim by National Engineers that Pan Am Engineers refuses to support the lists established in the intra-union arbitration

because Pan Am Engineers disagrees with how the award deals with certain aspects of its members' seniority. The National Engineers states that Pan Am Engineers, instead, tried to negotiate seniority for its members with Pan American by asking the company to change the award and implement lists at variance with it. Failing Pan American's acceptance of the proposal, Pan Am Engineers asked the company to arbitrate flight deck personnel seniority under section 13(a) of the LPP's. After the National Engineers' motion was filed, however, Pan American refused to bargain separately with Pan Am Engineers. Pan American acknowledged the intra-union procedural agreement and Pan Am Engineers' commitment to abide by the arbitration award as the integration proposal on behalf of all crewmen. Pan American decided to accept, unchanged, the lists developed by the award. Although Pan Am Engineers has again asked Pan American to arbitrate integrated seniority, for reasons more fully explained below, we are satisfied that Pan American, in this case, fulfilled its duty pursuant to the LPP's to integrate flight engineer and pilot seniority fairly and equitably. There is, accordingly, no necessity for ruling on National Engineers' motion to confirm and enforce the arbitration award. We dismiss the motion as moot.

We dismiss the petitions to set the arbitration award aside. Janus Group and PAPF speak for certain former Pan American crewmen dissatisfied with the substance of the award. These employees contend that, because the award's seniority lists are unfair and inequitable to them, it must be invalidated. They contend that, in order to comply with section 3 of the LPP's, their spokesman, along with the four certified bargaining representatives for Pan American and National crewmen, must bargain anew with Pan American about integrated seniority and, if necessary, arbitrate the matter under LPP section 13(a). Our authority, however, over arbitration volun-

tarily undertaken by employee representatives in connection with a Board-approved acquisition or merger "is confined to examining whether the arbitration was fairly and equitably conducted." Furthermore, "an employee is bound by the resolution of seniority and other disputes by his authorized bargaining representative in negotiations or binding arbitration, unless the employee can show that the resolution was tainted by the union's breach of its duty of fair representation." [2] We find below that Janus Group and PAFP have not shown that the procedure used by their members' certified bargaining representatives was defective or that the representatives breached their duty of fair representation of Janus Group and PAPF members.

* * * *

Based on the record before us,[3] we find that:

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[2] *Allegheny-Mohawk Merger Case (Complaint of Kingston and Foster)*, Order 79-11-53 at 17, *aff'd sub nom. Kingston, et al.* v. *CAB*, No. 80-1028 (D.C. Cir., decided without opinion March 6, 1981).

[3] Numerous pleadings from parties affected by the pilot-flight engineer problem at Pan American were filed in this case. We docket and entertain all filings received on or before September 3, 1981. Accordingly, the motions received by September 3 for leave to file otherwise unauthorized documents pursuant to Rule 4(f) of our Procedural Regulations, 14 C.F.R. § 302.4(f), are granted.

We grant PAPF's request on July 13, 1981, for confidential treatment under Rule 39, 14 C.F.R. § 302.39, of portions of the text and Exhibits B through L of PAPF's petition to set aside the arbitration award filed the same date. The material contains facts about named employees' seniority. We do not rely upon this information in ruling on PAPF's petition; therefore, its disclosure to the parties in the proceeding or the public is unnecessary. The material will be returned to PAPF after the instant order issues.

We deny Pan Am Engineers' motion filed April 30, 1981, to strike National Engineers' motion for confirmation and enforcement of the arbitration award. We deny Pan American's motion filed August 7, 1981, for expedited action.

The seniority procedural agreement signed by National Engineers, Pan Am Engineers, National Pilots, and Pan Am Pilots. On March 19, 1980, following Pan American's merger with National on January 19, 1980, the four labor organizations representing the carriers' flight engineers and pilots agreed to a procedure that they would use to determine integrated seniority. Pan American was not a party to the agreement since its purpose was to produce the proposal for seniority integration that the union representatives would advance in collective bargaining with Pan American as required by LPP section 3.[4]

The procedure called for negotiation by the union parties, who had "complete and full authority to act for and in behalf of their respective employee groups for the purpose of integrating the seniority lists of pilots and flight engineers" (paragraph 2). Absent negotiated consensus, mediation must follow. And if integration was not agreed

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[4] The labor parties referred to the procedural agreement as complying with section 13(b) of the LPP's (introductory paragraph 2). They are mistaken. Section 13(b) reads,

> (b) The above condition [in (a) for arbitration] shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure, unless and until that alternative method or procedure shall have been agreed to by all the parties.

We have held that this provision means exactly what it says. *North Central-Southern Merger Case (Petition of IAM)*, Order 81-6-56 at 3. It permits an "alternative method" to arbitration as settlement for a "particular dispute" arising out of seniority bargaining between a carrier and employees/representatives under section 3, when "the parties" to the dispute mutually agree to the alternative. Section 13(b) is not relevant to how the representatives of employees affected by an acquisition or merger decide to settle their internal disagreements about LPP seniority matters prior to bargaining with the carrier. *See also* n.12, *infra*.

to by mediation, "arbitration should be mandatory" (paragraph 8(a)). The arbitrator, then, was "to merge the respective seniority lists in a fair and equitable manner" (paragraph 8(i)), and he had authority to resolve the "issues remaining open between the parties" at that stage in the procedure, and to confirm agreements and stipulations made by the parties in negotiation and mediation (paragraph 8(f)). The arbitrator's award was "final and binding as to all flight deck operating crew members and shall be defended by the parties" to the agreement (paragraph 8(j)). Furthermore,

> All parties * * * shall in good faith seek its acceptance and its implementation by the Company in unchanged form. No change will be agreed to by any party with the Company unless all parties agree in writing to such change. Should agreement not be reached with the Company in its entirety, the parties will present and advocate the award in its entirety in any arbitration proceedings with the Company [pursuant to section 13(a) of the LPP's] to resolve seniority integration. Paragraph 13.

The arbitration. After unsuccessful intra-union negotiation and mediation on seniority integration, arbitration took place before Arbitrator Lewis M. Gill.[5] The hearing, fully participated in by the four union repre-

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[5] Arbitrator Gill was named in the procedural agreement as the arbitrator ("The Arbitrator shall be Lewis Gill. In the event that he is unwilling or unable to serve for any reason, the Arbitrator shall be * * *, * * *, or * * *, to be chosen by lot" (paragraph 8(b)).). Clearly, he was the first choice of the parties to the arbitration, including Pan Am Engineers, and understandably so. Arbitrator Gill is experienced with airline seniority, having participated in integrating seniority and resolving seniority disputes in connection with, for example, the United-Capital, Bonanza-Pacific-West Coast (Air West), Alaska-Alaska Coastal, Allegheny-Mohawk, and Saturn-TIA consolidations. Neither Janus Group nor PAPF has raised a question as to his qualifications to decide the seniority dispute.

sentatives, lasted approximately 35 days and closed on January 14, 1981. At the hearing, Janus Group appeared twice to present its integration position. Following the hearing, Arbitrator Gill held 15 days of executive session with the union parties. Ultimately, the record contained over 4,700 transcript pages and hundreds of exhibits.

On March 12, 1981, Arbitrator Gill issued an award, "the culmination," he stated, "of an exceptionally lengthy series of proceedings * * *." [6] Three aspects of the award were particularly difficult to resolve, and created great dissention among the parties. They remain under attack before us.

The award: on crew complement and cross-bidding. In 1948, the Board required (under authority now exercised by the Federal Aviation Administration) that air carriers use a third cockpit crew member, along with two pilots, on all aircraft certified for more than 80,000 pounds maximum take-off weight. Two patterns of implementation of this decision developed in the industry. One group of carriers, including Pan American and National, used flight engineers as the third crewman; namely, an individual holding a flight engineer's certificate issued by the FAA and whose assigned duty was to assist the pilots in the mechanical operation of the airplane. The second group of carriers assigned pilots, with engineer certification, to the third seat. When jet aircraft appeared in the 1950's, ALPA took the position that the third crewman must be a pilot. FEIA opposed this, and controversy resulted at most airlines, many being struck by the unions.

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[6] From beginning to end, implementation of the union's procedural agreement for seniority integration took a year, "a remarkably long time to carry out." Both statements by Arbitrator Gill, on the difficulty that the unions had in resolving the seniority question, were made in a 59-page opinion, dated May 11, 1981 (at 1-2), in which he "discusses the issues and sets forth the reasons for the decisions which are embodied in the Award" (*id.* at 1).

National decided to continue using flight engineers. Consequently, it continued to have two airmen groups, engineers and pilots. It maintained two independent seniority lists, and did not allow cross-bidding or displacement between the groups. Pan American decided to begin using pilots/engineers ("P.F.E.'s") as the third crewman. Its flight deck personnel, from then on, were combined on a single seniority list. P.F.E.'s were allowed to bid for pilot vacancies and bump back to engineer positions to avoid furlough. Since Pan American's former flight engineers did not qualify as pilots, the carrier agreed with Pan Am Engineers to treat them in a special way, for bidding purposes, as long as they worked for the carrier. Memorandum of Agreement dated May 13, 1963. These engineers (listed by name in Appendix A of the memorandum) had "the prior right as against flight crew members other than the [Appendix A] flight engineers * * * to bid for and occupy the third crew member position * * *."[7]

At the time of the instant seniority arbitration, Arbitrator Gill found that "unusual difficulty arises from the fact that the 'cross bidding' arrangements between the pilots and the engineers at the two airlines are wholly different" (Opinion at 8). Deciding "not to disturb the [premerger] cross-bidding situations * * *" (*id.* at 54), Arbitrator Gill set-up two integrated lists. One, called the "Pilot List," contained National pilots and all Pan American airmen; the other, the "Engineer List," contained National engineers and all Pan American airmen (Award at I). With such list arrangement, which in effect duplicated National's two-lists for pilots and engi-

[7] The May 13, 1963 company-union agreement was implemented further by separate agreement between the company and each Appendix A engineer. These private contracts provided that if Pan American took any action detrimental to the engineer's "prior right" to the third flight deck position, the claim against the company could be arbitrated (paragraph 4).

neers, and Pan American's single airman list, Arbitrator Gill then had cross-bidding be,

> As before on each airline. Pan Am airmen continue cross-bidding practices vis-a-vis each other, but Pan Am Pilots cannot bump National Engineers. National Pilots cannot bid Engineers positions, National Engineers cannot bid Pilot positions. National Engineers to have the same rights as Pan Am Appendix A Engineers against being displaced from Engineers seats by Pilots. Award at IV.C.

In so determining lists and bidding, Arbitrator Gill rejected strong objection by Pan Am Engineers that he had violated the May 13, 1963 crew complement agreement and exceeded his authority in the arbitration. The union argued, first, that Pan Am Appendix A engineers' prior right to the engineer seat ran against all other Pan American airmen and all National airmen, *including National flight engineers.*[8] Second, Pan Am Engineers asserted that the crew complement agreement gave Pan American P.F.E.'s *an unlimited right* to bid for engineer seats if they were not held by Appendix A engineers. The union argued, therefore, that Arbitrator Gill could not except National engineers from displacement by P.F.E.'s. Arbitrator Gill found that, by these contentions, Pan Am Engineers was simply trying "to impose that agreement on the National airmen against their will" ("Opinion at 54). Pan American airmen, in his judgment, "will continue to have the cross-bidding and bumping rights vis-a-vis each other (except for Appendix A engineers) which they have had before [under the May 13, 1963 agreement] * * *." But, he concluded, "that

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[8] The award begins the engineer list by "[s]traight date of hire for all National Flight Engineers hired before February 22, 1964 and all PAA Flight Engineers hired prior to February 22, 1964 * * *" (at I.B. 1.). Pan Am Engineers insisted that the list must begin with Appendix A engineers regardless of their date of hire relative to that of National engineers.

Agreement *cannot be viewed as binding on the National airmen, who were not parties to it.*" *Id.* at 54-55 (emphasis added).

The award: on furloughees. "[O]ne of the most explosive of all the issues in the entire case," Arbitrator Gill found, concerned the furlough situation at Pan American (Opinion at 40). A few years before the merger, the carrier had converted most of its fleet from narrow-bodied 747's to secure "more seats with fewer planes" (*id.* at 7). Arbitrator Gill found that the effect on Pan American's flight deck personnel had been that "[a] great many crew members who were hired in 1966, 1967 and 1968 with the advent of the new 747's, were furloughed in the early 1970's as the phasing out of the 707's got underway, *and nearly 400 of them were still on furlough at the time of the merger in January 1980*" (*ibid.* (emphasis added)). There was "a head-on-clash" in the arbitration "over the relative equities as between large numbers of National airmen hired between 1968 and 1978 and actively employed at the time of the merger, and large numbers of these Pan Am furloughes with earlier dates of hire who still have recall rights but who brought no active jobs to the merger" (*id.* at 8). Had a proposal been made by the parties, or Janus Group, "which would estimate the *likely dates of recall* of the furloughees and the likely length of service of the active pilots at those dates," Arbitrator Gill would have "slot-[ted] the furloughes in[to the integrated lists] on that basis" (*id.* at 41). No such proposal was made, "[p]erhaps because of the difficulties in fashioning projections of that nature * * *" (*ibid.*).

Arbitrator Gill thus decided that the "realistic and fair solution" to furloughee seniority would be "to calculate the length of service of the furloughees *at the time of their recall*, and to slot them into the list by comparing their length of service with that of the active airmen *at that time* * * *" (Opinion at 41, 40). *See* Award at

I.A.6. and I.B.4.[9] To Pan Am Engineers' and Janus Group's "strong protests over what they termed this concept of 'floating length of service' for the furloughees," and its alleged illegality because "it does not provide a definite and final merged list at this point, but leaves the placement of the furloughees to be determined at future dates" (Opinion 41), Arbitrator Gill responded:

> This may well be a novel approach, but the problem itself is novel—there has not been any previous merger case called to my attention *where such massive numbers of furloughees, with such long periods of being off the property, were pitted against airmen from the other airline who brought current jobs to the merger.* Opinion at 40 (emphasis added).

He concluded that no persuasive argument had been made by the parties or Janus Group that the award's "time of recall" calculation of furloughee seniority "is unfair or otherwise improper" (*id.* at 41).

The award: on ratio method. Pan American's reliance on 747 aircraft, contrasted with National's use of smaller planes, also complicated construction of an integrated seniority list for pilots. Because of the timing of hiring pilots at the two airlines, Arbitrator Gill found that there was great disparity between the number of Pan American and National pilots who could reasonably expect to man the larger, and higher paying, 747 and 727 aircraft in the future. *See* Opinion at 15-22. National airmen hired after 1964, moreover, would be denied the prospects for advancement to larger aircraft that they could have expected, under ordinary circumstances, absent the merger. To cure the "substantial practical inequities" against the National pilots in this regard (*id.* at 22), Arbitrator Gill

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[9] Exception was made for about 34 furloughed Pan American pilots who had received notice of recall before January 18, 1980. Their seniority was calculated like that of pilots who were working on the merger date. Award at I.A. 6.

determined to construct the middle part of the pilot list by a ratio method. Above and below this section, pilots were integrated by date of hire ("DOH") and/or length of service—*i.e.*, DOH with furlough time deducted ("LOS"). Award at I.A.[10]

Pan Am Pilots favored a DOH-LOS list exclusively, and Arbitrator Gill's use of a ratio method, even for part of the list, "brought some extraordinarily bitter complaints * * *" (Opinion at 24). Nonetheless, Arbitrator Gill concluded that he had been given "the very broad direction," under the union parties' March 19, 1980 procedural agreement setting forth the guidelines for the arbitration, that "it shall be the duty of the Arbitrator to merge the respective seniority lists in a fair and *equitable manner*" (Opinion at 10). *See* March 19, 1980, Agreement at paragraph 8(i). Moreover, while ALPA's guidelines for construction of merged lists were not binding in this case, FEIA also being involved, Arbitrator Gill found them "entitled to considerable weight, since a large majority of the airmen involved in the case *are* ALPA members and since the Flight Engineers do not have any similar set of guidelines to be compared with those in the ALPA Manual" (Opinion at 10). Arbitrator Gill held it "fair to summarize" the ALPA guidelines, "the relevant portions of which have been unchanged at least since December 1971" (*ibid.*), as requiring,

> [C]onsideration first to a DOH list, then (if 'acceptable accommodation' of the equities is not accomplished by such a list) to look at an LOS list, then (if 'satisfactory accommodation' of the equities is still not accomplished) to attempt to accommodate the remaining inequities through temporary restrictions or conditions, and finally (if a 'satisfactory ac-

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[10] Pilots hired before February 22, 1964, were integrated by date of hire. Length of service criteria were used for pilots hired after that date.

> commodation' is still not accomplished) to the 'deviation' from the DOH and LOS manner of constructing the list in order to reach a 'fair and equitable solution.' *This 'deviation' has often taken the form of a ratio arrangement for all or part of the merged list.* Opinion at 12 (emphasis added).

See ALPA "Merger Policies" Manual at paragraph 5, steps I-IV. Indeed, as Arbitrator Gill emphasized, "departures from length of service * * * are no rarity in * * * merger cases;" and he noted his use of a ratio in the *Bonanza-Pacific-West Coast (Air West)* merger and his comment there that "[s]peaking for myself, I would have favored using straight length of service as the basis for merging the lists *if there were no substantial practical inequities which could not be covered by special protective provision*" (quoted in Opinion at 38 (emphasis in original)). As for the instant merger, Arbitrator Gill reiterated that,

> That is still my view. In this case, however, as in * * * [*Air West*], I have concluded that there *are* some 'substantial practical inequities' in unrestricted operation of straight length of service which * * * could not feasibly be cured in workable and readily administrable fashion by special protective provision [, the last alternative to ratio method in ALPA guidelines]. Opinion at 38.

Thus, with "departures from length of service * * * not uncommon," and "expressly sanctioned by ALPA policy where they are *deemed necessary to provide a 'fair and equitable solution,'* " Arbitrator Gill turned aside Pan Am Pilots' opposition to a ratio method, and used it to integrate part of the Pan American-National pilot list.

The aftermath. All of the parties to the arbitration accepted the Gill award as the final and binding seniority proposal to submit to Pan American for implementation, except Pan Am Engineers. Pan Am Pilots, National

Pilots, and National Engineers did so despite their dissatisfaction with parts of the award, which clearly represented compromise solutions to four-way disputes on integration issues. ("There are parts of * * * [the award] that the * * * [Pan Am Pilots] is not pleased with" (August 7, 1981, Opposition at 10); "The National Pilots also have most serious 'reservations' concerning certain aspects of the Gill Award * * *" (May 12, 1981, Answer at 1).).[11] Pan Am Engineers continued to argue about the award's treatment of crew complement, cross-bidding, and furloughee issues. The union independently, and contrary to paragraph 13 of the March 19, 1980 seniority procedural agreement, *supra*, asserted to the company that bargaining must resume on these issues and, if necessary, be resolved by a second arbitration, this time conducted pursuant to section 13 of the LPP's.

Pan Am Engineers' position has been expressed to us, not directly by a petition to set aside the award, but in the union's opposition to National Engineers' motion to confirm and enforce the award. According to the union, Arbitrator Gill acted beyond the scope of his authority by integrating the seniority lists in a manner which assertedly abrogated Pan American's own premerger employees' private contract rights. After Pan American agreed to implement the seniority lists, Pan Am Engineers filed an additional pleading asserting that the carrier had no authority to put the award into effect because a dispute still existed with the union group under section 3 of the LPP's.

Two groups, moreover, have asked us to set aside the award. Janus Group argues for this because, assertedly, "the interests of the members of the Janus Group were

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[11] ALPA, International also filed with the Board in support of the award. ("[T]he law necessarily affords the employees' representatives a wide range of discretion * * * to engage in flexible and rational compromise * * *" (August 7, 1981, Answer at 5).).

not adequately considered [in the Gill arbitration] and * * * the integration award eventually issued by Arbitrator Gill was not 'fair and equitable' within the meaning of the labor protective *process*." Janus Group's asserted remedy is a new arbitration in which it "is granted *full party status* * * *." Petition at 2 (emphasis added).

PAPF, the group of Pan Am pilots formed in response to the award, argues that it must be set aside because a ratio method was used to integrate some pilot seniority. PAPF insists, as did Pan Am Pilots throughout the arbitration (discussed above), that a "time served" method, either DOH or LOS, is the only fair and equitable basis for integration; a ratio method is, assertedly, "inconsistent with the LPP's" (Petition at 2 and 24). The group asks us to require "all the parties, including RAPF and Janus Group, to renegotiate the award or to order such other relief to ensure that the final integrated seniority is fair * * * [and] equitable * * *" (*id.* at 24-25).

Holding itself apart from all of the foregoing controversy, Pan American accepted the Gill award on June 26, 1981, and agreed to implement the award entirely unchanged.[12]

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[12] In accepting and implementing the award, Pan American stated that it had "determined to waive its right to an arbitration under Section 13(a) of the [LPP's] * * *." In other words, the carrier simply decided to forego bargaining with the employees' representatives about changes in the award which entailed the possibility that arbitration would be required with the representatives to settle bargaining disputes (July 2, 1981, Statement at 1). Pan American further stated that "[c]onsequently, the fair and equitable integration of flight deck operating crew members seniority has now been accomplished pursuant to Section 13(b) of the [LPP's] * * *" (*id.* at 2). Consistent with our comments *supra*, at n.4, the company is mistaken in the latter view. Since Pan American accepted, completely, the employees' seniority proposal, there was no dispute which required resolution under the procedure of sections 13(a) or 13(b).

Conclusions. We shall dismiss National Engineers' (or the "flight engineers formerly in the employ of National's") motion to confirm and enforce Arbitrator Gill's award. As Pan American has given full force and effect to the award, the request for our intervention is now moot.

The carrier's action is wholly consistent with our long-held, and judicially approved, view that "absent a showing of bad faith, the adoption by a carrier of an integrated seniority list proposed by the collective bargaining representatives of the employees involved amounts to the carrier having made 'provisions * * * for the integration of seniority lists in a fair and equitable manner' within the meaning of section 3 of the Board's labor protective provisions." [13] It follows, therefore, that we also dismiss Janus Group's and PAPF's petitions to set aside the award. Neither group, both formed to forward the views of some Pan American furloughees and pilots, respectively, who were otherwise represented in the intra-union arbitration by Pan Am Engineers and Pan Am Pilots, has shown that these union representatives breached their duty of fair representation. The record before us amply demonstrates that all union parties vigorously advocated positions on seniority integration advantages to their members. Janus Group, in addition, appeared in the arbitration to express, directly to Arbitrator Gill, its position for furloughees. To the extent that some of the parties failed to prevail in the substance of their views, and hence occasioned disappointment for certain furloughees and pilots, that is not grounds for our review of the intrinsic nature of the integration system established by the award. It is well-settled that the Board properly "decline[s] to review and to enter judgment on the merits of * * * [union representatives'] negotiated resolution of

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[13] *Delta-Northeast Merger Case*, Order 73-1-24 at 5, *aff'd Northeast Master Executive Council* v. *CAB*, 506 F.2d 97 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110.

* * * [an internal union] seniority dispute arising out of a merger" if satisfied "that the resolution was reached in a fair and equitable manner." [14] Here, the record shows that the labor parties adopted fair and equitable procedures—four-way negotiation, mediation, and final and binding arbitration—to resolve their differences on merged seniority; and that the procedures were faithfully carried out—even to the unanimous selection of an eminent arbitrator in airline seniority matters.

What remains is Janus Group's charge that it was entitled to "full party status" in the seniority arbitration. We have, twice before in this merger case, rejected the identical claim (Orders 77-12-163/164/165 and 81-4-141). It is perfectly clear now that Janus Group, on its own and through union representation, fully participated in integrating seniority within the meaning of the LPP's. They were accorded an opportunity to present a statement of position and a closing argument in the arbitration. Their interests were also represented by the Pan Am Pilots and Pan Am Engineers at all stages of the arbitration.

What remains of PAPF's petition is the claim that "length of service" must be used, exclusively, to integrate pilot seniority under LPP section 3. The Board has long recognized that seniority lists may properly be predicted on factors other than length of service (*Delta-Northeast Merger Case, supra* Order 73-1-24 at 4):

> [T]he integration of seniority lists based on factors other than, or in addition to, date of hire or length of service is by no means uncommon: See, *e.g., Delta-C&S Seniority List*, 29 C.A.B. 1347 (1959), *aff'd sub nom. Outland* v. *CAB*, 284 F.2d 224 (D.C. Cir. 1960). Nor can we conclude that the use of factors in addition to date of hire or length of service is so unfair as to require that we adopt a general rule

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[14] *Kingston and Foster, supra* Order 79-11-53 at 15.

> forbidding carriers from accepting seniority lists formulated on the basis of such additional factors. See, *e.g.*, *North Atlantic Route Transfer Case* [12 C.A.B. 124 (1950)].

As the U.S. Court of Appeals for the District of Columbia Circuit said in affirming that judgment, the integration "problem has no facile solution * * *," and the Board's action "in refusing to look behind the freely negotiated list [, which used factors other than length of service,] * * * [is] wholly consistent with * * * [the Board's] obligation under the Act" (*Northeast-MEC* v. *CAB*, *supra* 506 F.2d at 104-105). We are satisfied, in the circumstances of this merger, that there were no facile answers available to Arbitrator Gill to resolve the myriad of complex and conflicting problems associated with pilot seniority integration. It was well within Arbitrator Gill's prerogative to address those problems through use of a ratio methodology in compiling a portion of the seniority lists.[15]

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[15] In challenging the award, PAPF assails the arbitrator's projections of the size of the merged carrier's fleet as of January 1, 1986. PAPF contends that these projections, which allegedly are inaccurate in light of certain events transpiring after the close of the record in the arbitration proceeding, warrant the overturn of the integrated list. Such assertion provides no basis for our intervention. As the Board has stated in similar circumstances (*Bonanza-Pacific-West Coast Merger Case*, Order 72-11-79 at 2):

> [W]e have previously made plain our intention that an arbitrator's decision rendered pursuant to § 13 be final and binding subject to only very limited exceptions * * *. We do not consider the existence of a mutual mistake in forecasting future facts to be one of these exceptions. Arbitration awards under § 13 may often hinge on forecast facts. While those forecasts may later prove erroneous, we think it of overriding importance that arbitration proceedings, like any other litigation, be capable of prompt and final resolution.

That reasoning applies equally in this proceeding.

It is noteworthy, moreover, that Pan Am Pilots—the authorized bargaining representative of the pilots seniority list at Pan American—supports the Gill award and opposes the petitions filed by a few of its constituents through the Janus Group and PAPF. As Pan Am Pilots recognize, it is virtually impossible to satisfy everyone—or sometimes anyone—in a seniority integration case. Arbitrator Gill was faced with totally opposed positions for the integration of the seniority lists, and the parties were fully permitted to develop their cases supporting their separate positions in a record involving over 4,700 transcript pages and hundreds of exhibits. In the end the arbitrator did what most arbitrators do—he picked parts of the different positions and made compromises to arrive at what he believed was an equitable result. There is no way, given the sharply divergent and contested positions of the parties, that the arbitrator could ever reach a result that was fully acceptable to all parties—to say nothing of the individual pilots and flight engineers whose interests were represented in the proceeding. That is an inevitable result of arbitration. The fact that dissatisfaction remains is no basis for requiring another seniority integration.

Finally, there is no merit to the contentions raised by Pan Am Engineers. We reject the argument that there has been no "agreement" between the carrier and labor representatives within the meaning of section 3 of the LPP's in view of Pan Am Engineers' present opposition to the Gill Award. As discussed, the labor representatives for all flight deck personnel—including Pan Am Engineers—entered into an agreement establishing a series of procedures to accomplish the integration of the seniority of the cockpit crew members of Pan American and National. That agreement made the award of the arbitrator final and binding upon its signatories and required them to seek implementation of the award with the company. The arbitration was held and the decision was sub-

mitted to Pan American and accepted. The carrier's acceptance of the labor representatives' list satisfies the obligations imposed by section 3. Having bound itself to follow the course for integrating seniority lists set forth in the inter-union agreement, Pan Am Engineers cannot force a new arbitration simply because it is dissatisfied with the results of the prior one.

We also reject the argument that Arbitrator Gill exceeded the authority given him in the union parties' March 19, 1980 procedural agreement. The arbitrator's mandate was broadly written "to merge the respective seniority lists in a fair and equitable manner" (Agreement at paragraph 8(i)). The assertion that Arbitrator Gill exceeded his authority, moreover, is predicated on the notion that flight engineers for premerged Pan American acquired vested seniority rights through contracts with Pan American, and that the arbitrator was without authority to interfere with those rights. To the contrary, it has long been recognized that private contract rights must, if necessary, yield to a fair and equitable integration of seniority lists pursuant to Board imposed LPP's. *See Kent* v. *CAB*, 204 F.2d 263, 266 (2d Cir. 1953), *cert. denied*, 346 U.S. 826; *American Airlines* v. *CAB*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972); *Sanders* v. *ALPA*, 361 F. Supp. 670, 672 (S.D.N.Y. 1973). National pilots and engineers, moreover, were not parties to, or bound by, the agreements between premerged Pan American and its premerger airmen.

Pan Am Engineers also urges that Arbitrator Gill exceeded his authority when he determined that those Pan Am airmen on furlough on the effective date of the merger will be slotted into the integrated seniority lists at such time as they are recalled to active service, with their seniority positions to be determined by their relative length of service at the time of their recall. The vice said to render this provision unlawful "is that furloughed

Pan American airmen remain unintegrated * * *" (May 12, 1981, Answer at 27). We disagree. The arbitrator has made full provision for the integration of Pan Am furloughees on the seniority lists. It is merely that the *method* of integration calls for a future event to trigger the *calculation* of their positions on the integrated lists.

In sum, we conclude that Pan American has integrated flight deck personnel seniority in compliance with the labor protective provisions. Our responsibility is confined to examining whether the integration was fairly and equitable conducted. The answer is affirmative.

ACCORDINGLY, we dismiss the motion of flight engineers formerly in the employ of National for confirmation and enforcement of arbitration award, and the petitions of Janus Group and Pan American Pilots Fighting to set aside arbitration award filed in the *Pan American-Acquisition Of Control Of, And Merger With National* case, Docket 33283.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

(SEAL)

All Members concurred.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 84 Civ. ———

JOHN C. COOK, *et al.*;

Plaintiffs

—against—

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER;

Defendants.

JURY TRIAL DEMANDED

COMPLAINT

John C. Cook, *et al.*, Plaintiffs, by and through their attorneys, Butler & Binion, file this Complaint against Pan American World Airways, Inc. ("Pan Am"); Air Line Pilots Association, International ("ALPA"); Air Line Pilots Association, Pan Am Chapter ("ALPA-PAA"); Flight Enginers International Association ("FEIA"); and Flight Enginers International Association, Pan Am Chapter ("FEIA-PAA"). In support of this Complaint, Plaintiffs will show the Court the following:

I.

PARTIES

1. Appendices A and B, attached hereto and made a part hereof, constitute a list of *439* Plaintiffs compiled as of the date of filing. Additional Plaintiffs are expected to "opt in" to this action.

2. Defendant Pan Am has continuously been and is now a New York corporation. It has no registered agent listed with the office of the Secretary of State for the State of New York. Therefore, it may be served with process by serving an officer of said corporation at its headquarters offices, located at the Pan Am Building, 200 Park Avenue, New York, New York, 10166. Pan Am is doing business in and has substantial contacts with the State of New York and City of New York, where it is engaged in the aviation business and employs more than twenty employees. Defendant Pan Am has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Sections 11(b), (g) and (h) of the ADEA, 29 U.S.C. §§ 630(b), (g) and (h).

3. Defendant ALPA has continuously been and is now an unincorporated association which represents pilots employed by Pan Am and other airlines concerning terms and conditions of employment. Defendant ALPA is made up of "chapters," each of which represents the pilots employed by a particular airline. Defendant ALPA may be served with process by serving the President, Secretary/Treasurer, or a business representative of said association at its offices located at 1625 Massachusetts Ave., N.W. Washington, D.C. 20036. Defendant ALPA has substantial contacts with the State of New York and City of New York. Defendant ALPA has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Sections 11(d) and (e) of the ADEA, 29 U.S.C. §§ 630(d) and (e). Defendant ALPA is subject to and must comply with the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, made applicable to the aviation business by 45 U.S.C. § 181, *et seq.*

4. Defendant ALPA-PAA has continuously been and is now an unincorporated association which represents pilots employed by Pan Am concerning terms and conditions of employment, and is a chapter of Defendant

ALPA. It may be served with process by serving the President, Secretary/Treasurer, or a business representative of said association at its offices located at 200 Park Avenue, New York, New York, 10166. Defendant ALPA-PAA has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Sections 11(d) and (e) of the ADEA, 29 U.S.C. §§ 630(d) and (e). Defendant ALPA is subject to and must comply with the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, made applicable to the aviation business by 45 U.S.C. § 181, *et seq.*

5. Defendant FEIA has continuously been and is now an unincorporated association which represents flight engineers employed by Pan Am and other airlines concerning terms and conditions of employment. Defendant FEIA is made up of "chapters," each of which represents the flight engineers employed by a particular airline. Defendant FEIA may be served with process by serving the President, Secretary/Treasurer, or a business representative of said association at its offices located at 905 - 16th St., N.W. Washington, D.C. 20006. Defendant FEIA has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Sections 11(d) and (e) of the ADEA, 29 U.S.C. §§ 630(d) and (e).

6. Defendant FEIA-PAA has continuously been and is now an unincorporated association which represents flight engineers employed by Pan Am concerning terms and conditions of employment, and is a chapter of Defendant FEIA. It may be served with process by serving the President, Secretary/Treasurer, or a business representative of said association at its offices located at Roosevelt Field, Garden City, N.Y. Defendant FEIA-PAA has continuously been and is now a labor organization engaged in an industry affecting commerce within the meaning of Sections 11(d) and (e) of the ADEA, 29 U.S.C. §§ 630(d) and (e).

II.

JURISDICTION AND VENUE

7. Jurisdiction of this Court is invoked pursuant to a) 28 U.S.C. §§ 451 and 1343; b) 28 U.S.C. § 1337; and c) the principle of pendant jurisdiction. This is an action authorized and instituted pursuant to a) Section 7(c), 29 U.S.C. § 626(c), of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. § 621, *et seq.*, which incorporates by reference Sections 16(b) and 17, 29 U.S.C. §§ 216(b) and 217, of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*; b) the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, as made applicable to the above-named Defendants by 45 U.S.C. § 181, *et seq.*, and c) the New York Human Rights Law, N.Y. Exec. Law § 290, *et seq.* (McKinney 1983).

8. The unlawful employment practices alleged below have been and are now being committed within the State of New York, in the Southern District. Venue in this Court is thus proper under 28 U.S.C. §§ 1391(b) and 1392(a).

III.

FACTUAL ALLEGATIONS

9. Plaintiffs John C. Cook, *et al.*, are all over 40 years of age, are and/or have been employed as Pilot-Flight Engineers by Defendant Pan Am, and are members and/or apprentice members of the Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA. All of the Plaintiffs whose names are listed in Appendix A filed charges, containing some or all of the allegations stated herein, in one or more of the following federal and state equal employment offices: a) the New York Regional Office of the U.S. Equal Employment Opportunity Commission;[1] b) the Miami District Office of the U.S. Equal Employment Opportunity

[1] 90 Church Street, Room 1501, New York, New York 10007.

Commission;[2] c) the San Joe Area Office of the U.S. Equal Employment Opportunity Commission;[3] d) the New Jersey Division on Civil Rights;[4] e) the New York State Division of Human Rights;[5] and f) the California Department of Fair Employment and Housing.[6] The above-referenced charges were filed between the dates of April 12, 1983, and September 2, 1983. This civil action is thus being commenced more than sixty days after the filing of all of the above-referenced charges, in compliance with the requirements in Section 7(d) of the ADEA, 29 U.S.C. § 626(d). The Plaintiffs listed in Appendix B did not file charges in federal or state equal employment offices, but are similarly situated individuals, with similar or identical claims against the Defendants, and are thus properly joined as Plaintiffs. This Complaint will be amended by the addition to Appendix B of other similarly situated Plaintiffs "opting in" to the action.

10. In 1980, Defendant Pan Am merged with National Airlines ("National"). Defendants ALPA and FEIA, through their chapters representing Pan Am and National pilots and flight engineers (i.e. chapters now consolidated as Defendants ALPA-PAA and FEIA-PAA), submitted to an arbitrator the integration of the pilot and flight engineer seniority lists of the to-be-merged companies. Defendant Pan Am expressly reserved the right to accept or reject the resulting arbitration award, which was issued on March 12, 1981. However, Defendant Pan Am subsequently accepted and implemented the Award in its entirety.

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[2] DuPont Plaza Center, Suite 414, 300 Biscayne Boulevard Way, Miami, Florida 33131.

[3] Crocker Plaza Building, 84 West Santa Clara, San Jose, California 95113.

[4] 180 University Avenue, Newark, New Jersey.

[5] 270 Broadway, New York, New York.

[6] 322 W. First Street, Los Angeles, California 90012.

11. The pilot seniority list resulting from the arbitration award was first implemented on a system-wide basis on March 28, 1983, has been implemented continuously up until the present time, and will continue indefinitely to be implemented, by Defendant Pan Am with the active support and/or acquiescence of Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA. The major characteristics of Pan Am's current pilot seniority system are as follows.

First, there are three cockpit positions on Pan Am's aircraft: two are pilot positions (Captain and First Officer), the third is the less rewarding and less lucrative Flight Engineer position. Under the current Pan Am pilots seniority system, pilots who worked for National before the merger of Pan Am and National may not be "bumped down" to the Flight Engineer position. Pilots who worked for Pan Am before the merger may be so demoted.

Second, rather than merging the pilot seniority lists of Pan Am and National such that the seniority position of each pilot would depend on his amount of credited experience, the current pilot seniority list uses a ratio to insert large numbers of former National pilots under age 40 ahead of older and more experienced Pan Am pilots over the age of 40.

Third, all pilot furloughs (i.e., layoffs) before 1986 are to proceed according to a one-for-one formula, whereby equal numbers of former Pan Am and former National pilots are furloughed, regardless of relative credited experience or relative position on the seniority list.

12. On March 28, 1983, Defendant Pan Am caused to be issued assignments ("assignments") to its flight deck crew personnel, based on the pilot and flight engineer seniority system.

13. On June 15, 1983, Defendant Pan Am caused to be furloughed, under the above-described pilot seniority sys-

tem, three of the Plaintiffs named in Appendix A: Robert L. Jarboe, Clifford E. Cool, and Richard V. Paul.

IV.

LEGAL CAUSES OF ACTION

14. By using and adopting, and by indefinitely continuing to use and adopt, the above-described seniority system in making employment decisions, Defendant Pan Am has limited, segregated and classified the Plaintiffs so as to deprive or tend to deprive them of employment opportunities and otherwise adversely affect Plaintiffs' status as employees, because of Plaintiffs' age, and will continue to do so, in willful and continuous violation of Section 4(a) of the ADEA, 29 U.S.C. § 623(a).

15. By using and adopting, and by indefinitely continuing to use and adopt, the above-described seniority system in making employment decisions, Defendant Pan has discriminated and will continue to discriminate against Plaintiffs in compensation and terms, conditions and privileges of employment because of age, in willful and continuous violation of Section 296 of the New York Human Rights Law, N.Y. Exec. Law § 296.

16. By actively supporting and/or acquiescing in, and by indefinitely continuing to actively support and/or acquiesce in, the above-described seniority system, Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA have limited, segregated, and classified their membership so as to deprive or tend to deprive the Plaintiffs of employment opportunities, limit Plaintiffs' employment opportunities, and other adversely affect the Plaintiffs' status as employees, and will continue to do so, on the basis of their age, in willful and continuous violation of Section 4(c) of the ADEA, 29 U.S.C. § 623(c), and Section 296 of the New York Human Rights Law, N.Y. Exec. Law § 296.

17. By actively supporting and/or acquiescing in, and by indefinitely continuing the support and/or acquisece in, the above-described seniority system, Defendants ALPA, ALPA-PAA, FEIA, and FEIA-PAA have discriminated and will continue to discriminate against Plaintiffs because of age, in willful and continuous violation of Section 296 of the New York Human Rights Law, N.Y. Exec. Law § 296.

18. By actively supporting and/or acquiescing in, and by indefinitely continuing the support and/or acquiesce in, the policies and practices complained of in the above paragraphs, the representation of Plaintiffs' interests by Defendants LPA, ALPA-PAA, FEIA, and FEIA-PAA has been and will continue to be arbitrary, discriminatory and/or in bad faith. Defendants have thereby breached their duty under the Railway Labor Act, 29 U.S.C. § 151 *et seq.*, to fairly represent the interests of the Plaintiffs.

PRAYER FOR RELIEF

WHEREOF, Plaintiffs respectfully request that this Court:

A. Grant preliminary and permanent injunctions prohibiting defendants Pan Am, ALPA, ALPA-PAA, FEIA, and FEIA-PAA from taking or causing to be taken any actions based on the illegal seniority system described herein, and correcting all past actions taken on the basis thereof, and further ordering Defendants to construct and implement a seniority system which eradicates the effects of the past and present unlawful employment practices described herein.

B. Order Defendants Pan Am, ALPA, ALPA-PAA, FEIA, and FEIA-PAA to make Plaintiffs whole by an award of damages.

C. Order defendants Pan Am, ALPA ALPA-FEIA, FEIA, and FEIA-PAA to pay liquidated damages to Plaintiffs, in light of Defendants' willful violation of the law.

D. Order Defendants to pay Plaintiffs' attorneys' fees and costs, including court costs.

E. Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

BUTLER & BINION

/s/ Jeffrey C. Londa
JEFFREY C. LONDA
1600 Allied Bank Plaza
Houston, Texas 77002
(713) 237-3270

ROBERT E. COHN
KEVIN F. FLYNN
1747 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20006
(202) 466-6900
Counsel for Plaintiffs

Of Counsel:

/s/ Jeffrey Bernbach
JEFFREY BERNBACH
521 Fifth Avenue
New York, New York 10175
(212) 687-9730

JURY TRIAL

Plaintiffs request a jury trial on all questions of fact raised by their Complaint.

/s/ Jeffrey C. Londa
JEFFREY C. LONDA

Dated: March , 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 84 Civ. ———

JOHN C. COOK, *et al.*;

Plaintiffs

—against—

PAN AMERICAN WORLD AIRWAYS, INC.; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; AIR LINE PILOTS ASSOCIATION, PAN AM CHAPTER; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION; FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, PAN AM CHAPTER;

Defendants.

VERIFICATION OF COMPLAINT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN C. COOK, being duly sworn, deposes and says:

1. I am one of the Plaintiffs in the above action.

2. The facts pleaded in the foregoing Complaint are true and correct to the best of my knowledge, information and belief.

/s/ John C. Cook
(Signature of Affiant)
JOHN C. COOK

Sworn to before me this
7th day of March, 1984

/s/ Linda L. Matoli
Notary Public, State of New York

APPENDIX C

AFFIDAVIT OF MR. HAROLD M. GAY, SR.

THE STATE OF PENNSYLVANIA)
)
COUNTY OF NORTHAMPTON)

BEFORE ME, the undersigned authority, on this day personally appeared Harold M. Gay, Jr. who under oath did state the following:

1. My name is Harold M. Gay, Jr. I am above the age of twenty-one years and fully competent to make this affidavit.

2. I am a Pre-Merger Pan American Pilot Representative on the Gill Award Disputes Resolution Committee, representing pilots who were employed by Pan American World Airways, Inc. ("Pan Am") before the merger of Pan Am and National Airlines ("National"). I have served in this position since September 7, 1983.

3. I have been employed by Pan Am as a Pilot since December 20, 1965. I am a member of the Air Line Pilots Association ("ALPA").

4. I am presently 42 years of age. I was born on January 31, 1942. I have read Plaintiffs' Complaint dated March 7, 1984. I am familiar with the pilot seniority list referred to in the Complaint and with events concerning its construction and implementation.

5. In 1980, Pan Am merged with National. ALPA and the Flight Engineer International Association ("FEIA"), through their chapters respectively representing Pan Am and National pilots and flight engineers, submitted to an arbitrator the decision as to how to integrate the pilot and flight engineer seniority lists of the to-be-merged companies. Pan Am expressly reserved the right to accept or reject the resulting arbitration award of arbitra-

tor Lewis M. Gill ("Gill award"). The Gill award was issued on March 12, 1981. On June 26, 1981, Pan Am voluntarily accepted the Gill award in its entirety.

6. In or about September 1981, Pan Am posted the integrated pilot seniority list, but stated that such list was "tentative" and that pilots could submit protests to Pan Am concerning their seniority position for an unspecified period following the posting of the tentative list. The "final" pilot seniority list was issued in or about March 1982.

7. On or about April 14, 1981, I attended a meeting of the ALPA Council #6, Pan American Chapter ("PAA") to which all ALPA-PAA members were invited. At that meeting, ALPA representatives assured me and the other members in attendance that we would not suffer economic or career damage as a result of the merged pilot seniority system. The ALPA representatives stated that any disadvantage which we could conceive of suffering because of the sequence of pilots on the seniority list would be mitigated by other "conditions and restrictions" contained in the pilot seniority system which would allegedly protect pre-merger Pan Am pilots.

8. Before the merger, Pan Am's fleet consisted of the Boeing 747 ("B-47"), Lockheed 1011 ("L-1011") and Boeing 727 ("B-727"). National's fleet consisted of the DC-10 and B-727. The B-727, L-1011 and DC-10 are "wide-bodied" aircraft. Pay for piloting such aircraft is more than that for piloting narrow-bodied aircraft. Under the terms of the pilot seniority system, the pre-merger assignments of Pan Am airmen on the B-747 and L-1011 and former National airmen on the DC-10 were to be preserved until January 1, 1986. A "fence" was thus constructed which prevented Pan Am airmen from obtaining assignments on the DC-10 and former National airmen from obtaining assignments on the B-747 and L-1011. The "fence" was structured so that during the

pre-1986 "freeze" period, the members of the respective pilot groups would receive the same intra-group promotions and demotions as they would have absent the merger. Under the terms of the pilot seniority system, this "fence" would be crossed and the "freeze" ended only if Pan Am were to sell, or withdraw from service, aircraft which had belonged solely to either Pan Am or National before the merger, *i.e.*, the B-747, L-1011 or DC-10. Pan Am's sale or withdrawal of any of the above aircraft would trigger the "conditions and restrictions" contained in the pilot seniority system, which were designed to permit limited crossing of the "fence" in the event of such sale or withdrawal.

9. Between the dates of December 12 and 31, 1981, Pan Am posted a "proffer," *i.e.*, a roster of vacancies, listed by aircraft, position and base station, on which crew members could bid for reassignment. Positions based on the bids received during that proffer were awarded on January 27, 1982. Between the time of its acceptance of the Gill award on June 26, 1981, and its posting of a proffer on December 12-31, 1981, Pan Am had not sold or withdrawn any of its B-747, L-1011 or DC-10 aircraft. Consequently, no former National airmen "crossed over" from equipment formerly in the fleet of National to assume the jobs of Pan Am airmen. Thus, under that proffer, no Pan Am airmen over age 40 were demoted in favor of former National airmen under age 40. The "fence" between the assignments of Pan Am and former National airmen was preserved.

10. Pan Am's three subsequent proffers had no disadvantageous impact on the assignments of any Pan Am airmen *vis-a-vis* former National airmen, and hence had no such impact on any Pan Am airmen over age 40, because Pan Am had not sold or withdrawn any aircraft which had belonged solely to either Pan Am or National before the merger. Thus, the "fence" between Pan Am and former National assignments was preserved from the

time of Pan Am's acceptance of the Gill award through its issuance of four proffers.

11. As of February 26, 1983, Pan Am had decided to withdraw from service two (2) B-747s and three (3) L-1011s; consequently, between the dates of February 26 and March 17, 1983, Pan Am issued a proffer to redistribute pilot assignments. On March 28, 1983, vacancies were awarded under the pilot seniority system pursuant to the proffer issued between February 26 and March 17, 1983. Pan Am's withdrawal of the B-747s and the L-1011s triggered the "conditions and restrictions" under the pilot seniority system. This resulted in extensive cross-overs of former National airmen to equipment formerly flown only by Pan Am airmen, and had a direct and indirect discriminatory impact on Pan Am pilots over age 40 throughout the seniority list. This was the first time that the Pan Am pilot seniority list functioned to the disadvantage of Pan Am pilots over age 40 and the advantage of former National pilots under age 40.

12. On information and belief, the ward of March 28, 1983 had the following impact on Pan Am pilots over the age of 40:

(a) Approximately one hundred (100) former National pilots under age 40 were given Captain or First Officer positions superior to those of several hundred Pan Am pilots over the age of 40 with greater credited experience.

(b) Of those one hundred (100) former National pilots under age 40, approximately sixteen (16) were given First Officer positions on wide-bodied aircraft, and approximately six (6) were given Captain positions, superior to those of several hundred Pan Am pilots over age 40 with greater credited experience.

(c) Three (3) Pan Am pilots (Richard Jarboe, Clifford Cool and Richard Paul), who were all over age 40 and had over 16 years of credited experience

as of March 28, 1983, lost their jobs on June 15, 1983 pursuant to the terms of the pilot seniority system. Over one hundred (100) former National pilots under age 40 and with less credited experience than Messrs. Jarboe, Cool and Paul remained employed by Pan Am.

(d) In hundreds of other instances, Pan Am pilots over age 40 received (and continue to receive) assignments inferior to those of former National pilots who are younger and have less credited experience than their Pan Am counterparts.

13. In or about November 1983, Pan Am decided to sell fifteen (15) and withdraw from service one (1) DC-10 aircraft, resulting in further cross-overs of former National airmen under age 40 into positions previously held by Pan Am pilots over age 40. On or about February 29, 1984, Pan Am awarded vacancies in redistribution of pilot assignments based on the sale and withdrawal of the DC-10s. This award was similar to the award of March 28, 1983 in its discriminatory impact upon and treatment of Pan Am pilots over age 40.

14. To the best of my knowledge, before Pan Am issued assignments on March 28, 1983 and proceeded to re-train and re-position its pilots pursuant to those assignments, no Pan Am pilot over age 40 suffered demotion, furlough nor actual financial loss relative to under-40 airmen as a result of the operation of Pan Am's integrated pilot seniority system. After March 28, 1983, and continuing with the assignments issued on February 28, 1984, Pan Am pilots over age 40 were given and continue to hold assignments inferior to those given younger, under-40 pilots formerly employed by National.

15. Pan Am pilots are put into groups called "base station categories" for purposes of determining working conditions such as the following: monthly lines of flying; blank lines of flying (a schedule of days on and off);

vacations; open time board (additional flying time); and temporary assignments. The composition of, and treatment of pilots under, each "base station category" is derived entirely from the composition of, and treatment of each pilot under, the main pilot seniority list (referred to as the "system" seniority list). No Pan Am pilot over the age of 40 was disadvantaged in his assignment relative to under-40 pilots under the "system" seniority list until the issuance and implementation of the assignments of March 28, 1983. Thus, to the best of my knowledge, there was also no monetary or other actual damage suffered by Pan Am pilots over the age of 40 as a result of the operation of the "base station categories" in favor of under-40 pilots until the issuance and implementation of the assignments of March 28, 1983. Since that date, Pan Am pilots over age 40 have suffered monetary and other actual damage as a result of the operation of the "base station categories."

16. Because of the foregoing, until March 28, 1984 no Pan Am pilot over age 40 suffered demotion, furlough, monetary damage or other actual damage, relative to pilots under age 40, pursuant to the Pan Am pilot "system" seniority list or "base station categories."

17. The terms of the Gill award have not been adhered to nor carried out "mechanically" by Pan Am in its implementation of the pilot seniority system. The Gill award was complex, and ambiguous in many significant respects. The Gill award gave Pan Am considerable leeway to interpret its terms to Pan Am's best advantage. The ambiguity of the Gill award, and the discretion that it consequently affords Pan Am in the implementation of the pilot seniority system, is demonstrated by the following.

18. Exhibit A, attached hereto, consists of the Gill award, as issued March 12, 1981. By its own terms, the award foresees disputes "relating to the application, im-

plementation, or interpretation of this Award"; Section III sets forth procedures for resolving such disputes.

> Any (such) dispute shall be initially presented to a standing committee composed of two (2) NAL Pilot, two (2) PAA Pilot, two (2) NAL Flight Engineer, and two (2) FAA Flight Engineer Merger Representatives, to be appointed by their respective Master Executive Councils (or appropriate FEIA bodies) immediately following the issuance of this Award. In the event that the dispute cannot be resolved by the Committee by majority vote and reduced to writing and signed, it shall be submitted for resolution to a neutral arbitrator. . .

As stated in § 2 of this Affidavit, I am a Pre-Merger Pan American Pilot Representative on the Gill Award Disputes Resolution Committee. Four major disputes have recently been submitted to the Gill Award Disputes Resolution Committee; two of these have had to be referred to a neutral arbitrator.

19. Exhibit B, attached hereto, consists of a letter from Charles A. Burkhardt, Chairman, New York Local, Flight Engineers International Association, PAA Chapter ("FEIA-PAA"), dated December 28, 1981. This letter contains the following:

> It has been some time now that Mr. Gill made his grand decision on the issue of seniority and now we have to try to unravel his words as to their meaning or intent. I would like to pass along to you some of the various views that have *been* put forth as to what he resolved. *Please do not hold me, the local, or the chapter as officially standing for any of these thoughts*, but merely as information on the problem. (Emphasis added.)

20. Exhibit C, attached hereto, consists of minutes of the January 11, 1983 meeting of ALPA-PAA Council

#6. Such minutes contain the following statement by J.B. MacQuarrie, Chairman of ALPA-PAA:

> The bids on the board for 727 in New York look like they will be awarded to the orange division (National pilots). *It seems hard to believe, but it looks like that's the way it will be done.* Now, on the DC-10 bids for New York, due to the reduction of fleet size on the 747 and L-1011 aircraft, the blue division (Pan Am pilots) should be entitled to all the vacancies posted. . . *It remains to be seen how the company will award these vacancies.* (Emphasis added.)

21. Exhibit D, attached hereto, consists of minutes of the January 20, 1983 meeting of the New York Local, FEIA-PAA. Such minutes contain the following statement by Charles A. Burkhardt, Chairman:

> *First, I'm not pleased or even think the Gill Award resolved the seniority list integration problem. I think it created more problems than it attempted to resolve.* Second, the Gill Committee was formed as part of the Gill award to resolve and interpret the terms thereof and further if unable to agree to select an arbitrator for a binding decision. In reading the Gill award the parties have much disagreement as to its terms, but have "elected" not to resolve any differences until an actual situation exists and someone claims injury or their "rights" have been denied. If this position by the Gill Committee persists, . . . *the Company will make an interpretation that may very well be in their interest and not the airmen involved.* (Emphasis added.)

22. Exhibit E consists of a newsletter to all Pan Am Flight Engineers from Paul Chorbajian, President of FEIA-PAA, dated April 8, 1983. The letter contains the following statement.

> The number of DC-10 Captain, First Officer and Flight Engineer vacancies awarded to former Na-

> tional and Pan Am airmen as a result of the DC-747 and L-1011 fleet reductions *is the Company's interpretation of how Mr. Gill intended that vacancies should be filled in this situation. Neither the former National pilots or engineers nor the Pan Am pilots or engineers agreed that the Company's interpretation is proper,* but cannot agree among themselves as to the number of vacancies available to either Pan Am or the former National airmen. Consequently, an expedited arbitration is being held with Mr. George Nicolau as the arbitrator. (Emphasis added.)

23. Exhibit F, attached hereto, consists of a proffer issued by Pan Am on February 25, 1983 and transmitted to all Pan Am Pilots and Flight Engineers. The proffer contains the following language:

> *In light of the uncertainties of the Gill award* it is suggested that if desire you submit a bid for any position you may wish to occupy in the order of your choice. (Emphasis added.)

The same statement has been included in each of the proffers issued by Pan Am since its adoption of the current pilot seniority system.

/s/ Harold M. Gay, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME by the said Harold Gay on this the 9 day of May, 1984, to certify my hand and seal of office.

/s/ Therese E. Brody
Notary Public in and for the
State of Pennsylvania

AFFIDAVIT

THE STATE OF FLORIDA)
)
COUNTY OF _____)

BEFORE ME, the undersigned authority, on this day personally appeared Robert L. Jarboe, who under oath did state the following:

1. My name is Robert L. Jarboe. I am above the age of twenty-one years and fully competent to make this affidavit.

2. Until my furlough on June 15, 1983, I was employed by Pan American Airways, Inc. ("Pan Am") as a Pilot/Flight Engineer. I was hired by Pan Am on June 5, 1967.

3. I am presently 43 years of age. I was born July 30, 1940. I have read Plaintiffs' Complaint dated March 7, 1984 and am familiar with the contentions contained therein.

4. As of June 26, 1981, the approximate date upon which Pan Am accepted the integrated pilot seniority list as constructed under the Gill award, I was employed by Pan Am as a Flight Engineer on the Boeing-727 ("B-727") aircraft. I retained this position through 1981 and 1982, until June 15, 1983.

5. By letter dated March 11, 1983, Pan Am informed me that I would be furloughed, *i.e.*, laid off, from Pan Am effective as of May 31, 1983. My furlough was subsequently postponed until June 15, 1983, when it became official. See Exhibit A, attached hereto. On information and belief, the furlough of June 15, 1983 had the following effect: three Pan Am pilots (Clifford Cool, Richard Paul, and I), all of whom were over age 40 and had over 16 years of credited experience as of the date of furlough, lost their jobs pursuant to the terms of the pilot seniority system. Over one hundred (100) former National pilots

under age 40 and with less credited experience than I or Messrs. Cool and Paul remained employed by Pan Am.

6. Before June 15, 1983, I suffered neither furlough, demotion, nor actual damage as a result of the operation of the integrated Pan Am seniority system. Since June 15, 1983, I have remained on furlough.

/s/ ROBERT L. JARBOE

SUBSCRIBED AND SWORN TO BEFORE ME bY the said Robert L. Jarboe on this the 10 day of May, 1984, to certify my hand and seal of office.

/s/ LAHO F. BURGESS
Notary Public in and for the
State of Florida

EXHIBIT A

Pan American World Airways
John F. Kennedy International Airport
Jamaica, New York 11430

March 29, 1983

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Dear Mr. Jarboe:

Please be advised that your furlough which was set for the close of business May 31, 1983 has been rescinded.

In accordance with the provisions for Section 4 of the Pilot Agreement or, if aplicable, Article 8 of the Flight Engineer Agreement, you are hereby informed that your furlough will now be effective close of business June 16, 1983.

Sincerely,

/s/ D. E. Pritchett
D. E. PRITCHETT
Vice President-Flight Operations

AFFIDAVIT OF MR. CHARLES E. EAGER

THE STATE OF NEW YORK)
)
COUNTY OF MADISON)

BEFORE ME, the undersigned authority, on this day personally appeared Charles E. Eager, who under oath did state the following:

1. My name is Charles E. Eager. I am above the age of twenty-one years and fully competent to make this affidavit.

2. I have been employed by Pan American World Airways, Inc. ("Pan Am") as a Pilot since May 31, 1966. I am a member of the Air Line Pilots Association ("ALPA").

3. I am presently 52 years of age. I was born November 19, 1931. I have read Plaintiffs' Complaint dated March 7, 1984 and am familiar with the contentions contained therein.

4. As of June 26, 1981, the approximate date upon which Pan Am accepted the integrated pilot seniority list as constructed under the Gill award, I was serving as first Officer on the Lockhead-1011) aircraft. I retained this position through 1981 and 1982, until April 25, 1983. On information and belief, all Pan Am airmen over age 40 similarly retained, until no earlier than March 28, 1983, the positions which they held before Pan Am's acceptance of the Gill award.

5. On or about March 28, 1983, vacancies were awarded by Pan Am under the pilot seniority system pursuant to the proffer issued between February 26 and March 17, 1983. On or about that date, I received notice that I was to be demoted from the position of

First Officer on the L-1011 to the position of First Officer on the Boeing-727 ("B-727"). The L-1011 is a wide-bodied aircraft; the pay for piloting such aircraft is higher than that for piloting the narrow bodied B-727. On or about April 25, 1983, I entered training in preparation for assuming my new position as B-727 First Officer.

6. As of about April 25, 1983, I was no longer salaried as an L-1011 First Officer, but as a B-727 First Officer. On or about June 1, 1983, I flew my first assignment as a B-727 First Officer.

7. On information and belief, the award of March 28, 1983 had the following impact or Pan Am pilots over the age of 40 positioned similarly to myself. Approximately sixteen (16) former National pilots under age 40 were given First Officer positions on wide-bodied aircraft, and approximately six (6) were given Captain positions, superior to those of several hundred Pan Am pilots over age 40, including myself, with greater credited experience. In hundreds of other instances, Pan Am pilots over age 40 received (and continue to receive) assignments inferior to those of former National pilots who are younger and have less credited experience than their Pan Am counterparts.

8. On or about February 29, 1984, Pan Am awarded vacancies in redistribution of pilot assignments based on its sale and withdrawal from service of sixteen (16) DC-10s. This award was similar to the award of March 28, 1983 in its discriminatory impact upon and treatment of Pan Am pilots over age 40. As a result of the award of February 29, 1984, I continued to be positioned as a B-727 First Officer, while former National pilots under age 40 were given Captain and First Officer assignments on wide-bodied aircraft.

9. I presently still hold the position of B-727 First Officer.

10. Before about April 25, 1983, I suffered neither demotion, decrease in salary nor actual damage as a result of the operation of the integrated Pan Am pilot seniority system. As of about April 25, 1983, and continuing to the present, I have suffered a decrease in gross annual salary of approximately $12,000 per year.

/s/ Charles E. Eager

SUBSCRIBED AND SWORN TO BEFORE ME by the said Charles E. Eager on this the 10 day of May, 1984, to certify my hand and seal of office.

/s/ KATHRYN L. NASH
Notary Public in and for the
State of New York

SUPREME COURT OF THE UNITED STATES

PAN AMERICAN WORLD AIRWAYS, INC. *v.*
JOHN C. COOK ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 85–878. Decided January 27, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

This petition presents the issue whether an integrated employee seniority list that was adopted by an airlines pursuant to a merger plan that the Civil Aeronautics Board (CAB) approved as "fair and equitable" can be attacked collaterally by the airline's employees in an action under the Age Discrimination in Employment Act (ADEA), 29 U. S. C. §621 *et seq.* The United States Court of Appeals for the Second Circuit held that respondents are entitled to bring such a collateral ADEA action. 771 F. 2d 621 (1985). This decision squarely conflicts with *Carey* v. *O'Donnell*, 506 F. 2d 107 (1974), cert. denied, 419 U. S. 1110 (CADC 1975). *Carey* holds that Section 1006 of the Federal Aviation Act, 49 U. S. C. §1486, which vests exclusive jurisdiction in the United States Court of Appeals for the District of Columbia to review CAB orders, precludes a collateral ADEA action of the type allowed by the Second Circuit in the present case. I would grant certiorari to resolve this conflict.